TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

No. [redacted] 19

MITSUGI NISHIKAWA, PETITIONER,

vs.

JOHN FOSTER DULLES, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1956

CERTIORARI GRANTED NOVEMBER 13, 1956

No. 14742

United States
Court of Appeals
For the Ninth Circuit.

MITSUGI NISHIKAWA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-21-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WIRIN, RISSMAN & OKRAND,
FRED OKRAND,
257 So. Spring St.,
Los Angeles 12, Calif.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney;
MAX F. DEUTZ, and
JAMES R. DOOLEY,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court, Southern District of California, Central Division

No. 14813-T

MITSUGI NISHIKAWA,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

COMPLAINT UNDER SECTION 503 UNITED STATES NATIONALITY ACT

Comes Now the plaintiff and complains of the defendant as follows:

I.

Plaintiff is a citizen of the United States. He was born in the United States, at Artesia, California, on April 20, 1916. He is at present a temporary resident of Tokyo, Japan.

II.

He claims Los Angeles, California, within this judicial district, as his permanent residence.

III.

The defendant is the Secretary of State of the Government of the United States. As such, he is the head of said State Department.

IV.

This Court has jurisdiction herein by virtue of

Title 8, [2*] United States Code, Section 903 (Section 503, United States Nationality Act).

V.

On or about August 15, 1939, plaintiff went to Japan for the purpose of further education and experience in the engineering field; his intention was to return to the United States.

VI.

On or about March 1, 1941, plaintiff was conscripted into the Japanese army and served in the Japanese army until August, 1945; his service in said army was due to the Japanese Conscription law, and was the result of coercion, and was not the plaintiff's free and voluntary act.

VII.

On or about December 1, 1947, the plaintiff applied for a passport as a citizen of the United States, in order to return to the United States, at the office of the United States Consul at Yokohama, Japan; said United States Consul refused to issue to the plaintiff a passport of the United States for the purpose aforesaid; and instead, on February 16, 1948, issued to plaintiff a Certificate of the Loss of the Nationality of the United States, on the ground that plaintiff had lost his United States citizenship by serving in the Japanese Army, which said certificate was approved by the Department of State on April 15, 1949.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

By this action, defendant has denied to the plaintiff a right and or privilege as a citizen of the United States.

At all times herein, said United States Consul was and is an officer and agent of the United States Department of State and in the denial aforesaid acted for and on behalf of the defendant, as Secretary of State of the United States.

Wherefore, plaintiff prays for a judgment and for a decree adjudging that he is a citizen and/or national of the United States, [3] and as such is entitled to the rights and/or privileges of a national of the United States, including a passport in order to return to the United States.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Plaintiff.

[Endorsed]: Filed December 5, 1952. [4]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S COMPLAINT

Comes now the defendant, John Foster Dulles, as Secretary of State, through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California, Clyde C. Downing and Robert K. Grean, Assistants United States Attorney for the Southern District of California, and in answer to

plaintiff's complant herein admits, denies and alleges as follows:

I.

Referring to the first averment of Paragraph I of plaintiff's complaint, denies that plaintiff is a citizen of the United States.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph I of said complaint and all of the allegations of Paragraph II of said complaint, and on that ground denies each and every other allegation therein contained.

II.

Admits the allegations contained in Paragraph III of plaintiff's complaint. [5]

III.

Defendant neither admits nor denies the allegations contained in Paragraph IV of plaintiff's complaint, on the ground that said allegations are conclusions of law.

IV.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of said Complaint and on that ground denies said allegations.

V.

Admits that the plaintiff entered and served in the Japanese Army from March 1, 1941, to August, 1945, but denies each and every other allegation con-

tained in Paragraph VI of plaintiff's complaint. Defendant alleges that plaintiff's entry and service in the Japanese Army was his free and voluntary act and not the result of coercion, and was at a time when plaintiff was a national of Japan.

VI.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII of said complaint, and on that ground denies each and every allegation therein contained, except that defendant admits that the United States Consul referred to therein was an officer and agent of the United States Department of State acting for and on behalf of the defendant as Secretary of State of the United States.

And for a Further, Separate and Second Defense, Defendant Alleges:

I.

Plaintiff's complaint fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises. [6]

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 6, 1953. [7]

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION OF JOHN FOSTER DULLES, AS SECRETARY OF STATE, AS PARTY DEFENDANT

It is Hereby Stipulated, pursuant to the provisions of Rule 25(d), Federal Rules of Civil Procedure, that John Foster Dulles, as Secretary of State, be substituted as party defendant in the above-entitled case.

Dated: 29 January, 1953.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Plaintiff.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

By /s/ ROBERT K. GREAN,
Assistant U. S. Attorney;
Attorneys for Defendant.

So Ordered: February 6, 1953.

/s/ WILLIAM M. BYRNE,
Judge, United States
District Court.

[Endorsed]: Filed February 6, 1953. [9]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 23, 1954

Present: Hon. Wm. M. Byrne, District Judge.

Counsel for Plaintiff: Hugh R. Manes.

Counsel for Defendant: James R. Dooley, Ass't. U. S. Att'y.

Proceedings: For trial.

Plaintiff is called, sworn, and testifies in his own behalf.

Plaintiff's Ex. 1 (Certificate of loss of nationality) is marked for ident. and admitted in evidence.

Plaintiff's Ex. 2 (Military service law of Japan) is admitted in evidence.

Attorney Dooley argues oral motion to dismiss.

Court orders said motion denied.

Plaintiff's Ex. 3 is marked for ident. only, said exhibit being an application for passport.

Counsel argue.

Court makes a statement and Orders judgment for defendant; Attorney Dooley to prepare and submit findings and judgment. [10]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having come on regularly for trial on December 23, 1954, before the Honorable Wm. M. Byrne, Judge Presiding without a jury, the plaintiff appearing by his attorneys, Wirin, Rissman & Okrand, by Hugh R. Manes, and the defendant appearing by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having considered the same, and having heard the arguments of counsel, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law: [11]

Finidings of Fact

I.

Plaintiff, Mitsugi Nishikawa, was born in the United States at Artesia, California, on April 20, 1916. He claims Los Angeles, California, within the jurisdiction of this Court, as his permanent residence.

II.

The defendant, John Foster Dulles, is the Secretary of State of the Government of the United States, and as such, is the head of the State Department.

III.

During August, 1939, at a time when plaintiff was 23 years of age, he journeyed to Japan, knowing at that time that he was likely to be called for military service in the Japanese Armed Forces.

IV.

Plaintiff remained in Japan from August, 1939, until March 1, 1941, and on the latter date plaintiff was inducted and entered into the Japanese Army. He served in said Army from March 1, 1941, until September 16, 1945. Plaintiff's entry and service in the Japanese Army was at a time when he was a national of Japan.

V.

On or about June, 1940, approximately nine months prior to his entry into the Japanese Army, plaintiff was notified to take and did take a physical examination for entrance into the Japanese Armed Forces. Between the date of this physical examination and the date of plaintiff's entry into the Japanese Army, plaintiff made no effort to return to the United States, nor did plaintiff [12] make any effort to avoid entry or service in the Japanese Armed Forces.

VI.

Plaintiff did not, during the period between June, 1940, and March 1, 1941, or at any time, protest his induction into the Japanese Armed Forces. Plaintiff made no attempt during this period to renounce

his Japanese nationality, nor did he communicate, or attempt to communicate, with either American officials in Japan, or with Japanese officials, with respect to the necessity or propriety of his entry and service in the Japanese Armed Forces.

VII.

It is not true, as alleged in plaintiff's Complaint, that his service in the Japanese Army was the result of coercion and was not the plaintiff's free and voluntary act.

VIII.

It is true that plaintiff's entry and service in the Japanese Armed Forces was his free and voluntary act.

IX.

On or about December 1, 1947, plaintiff went to the American Consulate at Yokohama, Japan, and orally requested a passport to return to the United States. Plaintiff's request for a passport was not granted, but instead, on February 16, 1948, the American Vice Consul at Yokohama, Japan, executed a Certificate of the Loss of Nationality of the United States, which Certificate stated, among other things, that plaintiff had expatriated himself under the provisions of Section 401(e) of Chapter IV of the Nationality Act of 1940, by serving in the Japanese Army from March 1, 1941, to September 16, 1945, as a Japanese national. [13] Said Certificate was approved by the Department of State, Washington, D. C., on or about April 15, 1949, and

a copy thereof was thereafter furnished to plaintiff.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and parties to this action, pursuant to Section 503 of the Nationality Act of 1940.

II.

Plaintiff possessed both United States and Japanese Nationality at the time of his entry and service in the Japanese Army.

III.

Plaintiff has lost his United States nationality, pursuant to Section 401(c) of the Nationality Act of 1940, by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan, and plaintiff is not now, and ever since said voluntary entry and service in the Japanese Armed Forces has not been, a citizen or national of the United States, and judgment should be entered accordingly.

Dated: This 17th day of January, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged January 6, 1955.

[Endorsed]: Filed January 17, 1955. [14]

United States District Court, Southern District of California, Central Division

No. 14813-WB Civil

MITSUGI NISHIKAWA,

Plaintiff,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Defendant.

JUDGMENT

The above cause having come on regularly for trial on December 23, 1954, before the Honorable Wm. M. Byrne, Judge Presiding without a jury, the plaintiff appearing by his attorneys, Wirin, Rissman & Okrand, by Hugh R. Manes, and the defendant appearing by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having considered the same, and having heard the arguments of counsel, and being fully advised in the premises, and the Court having made its Findings of Fact and Conclusions of Law, and having ordered that judgment be entered in acordance therewith;

Now, Therefore, It Is Ordered Adjudged and Decreed as Follows: [16]

I.

That the plaintiff, Mitsugi Nishikawa, born at Artesia, California, on April 20, 1916, and having

acquired United States nationality at birth, lost his United States nationality by voluntarily entering and serving in the Armed Forces of Japan, from March 1, 1941, to September 16, 1945, while a national of Japan, and plaintiff is not now, nor has he been since said entry and service in the Japanese Armed Forces, a citizen or national of the United States.

II.

It is Further Ordered that plaintiff's prayer for a judgment and for a decree adjudging that he is a citizen and/or national of the United States be, and the same hereby is denied.

III.

It is Further Ordered that defendant shall have judgment and his costs. Costs taxed at $20.00.

Dated: This 17th day of January, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

Lodged January 6, 1955.

[Endorsed]: Filed January 17, 1955.

Docketed and entered January 19, 1955. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Mitsugi Nishikawa, plaintiff above named, hereby appeals to the United

States Court of Appeals for the Ninth Circuit from the judgment entered in this action on January 19, 1955.

Dated: This 16th day of March, 1955.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 17, 1955. [18]

In the United States District Court, Southern District of California, Central Division

No. 1483-WB Civil

MITSUGI NISHIKAWA,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State,

Defendant.

Honorable William M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

December 23, 1954

Appearances:

For the Plaintiff:

WIRIN, RISSMAN & OKRAND, By HUGH R. MANES, ESQ.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney,
Chief of Civil Division, and

JAMES R. DOOLEY,
Assistant United States Attorney.

Thursday, December 23, 1954—9:40 A.M.

The Court: Call the calendar.

The Clerk: Case No. 14813, Mitsugi Nisikawa vs. John Foster Dulles.

Mr. Manes: Ready for the plaintiff.

Mr. Dooley: Ready for the defendant.

Mr. Manes: Take the stand, please.

MITSUGI NISHIKAWA

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Mitsugi Nishikawa.

Direct Examination

By Mr. Manes:

Q. Mr. Nishikawa, when and where were you born, please?

A. April 20, 1916, Artesia, California.

Q. You claim Los Angeles, California, as your permanent residence? A. Yes, sir.

(Testimony of Mitsugi Nishikawa.)

Q. When did you go to Japan?

A. On or about August 15, 1939.

Q. Prior to that time had you resided continually in the United States? [3*] A. Yes.

Q. And had you been educated in the schools of the United States? A. Yes, sir.

Q. Did you ever serve in the Japanese Army?

A. Yes, sir.

Q. When?

A. On or about the 1st of March, 1941, I was drafted in the Japanese Army.

Q. You were drafted? A. Yes, sir.

Q. What do you mean by being "drafted"?

A. I received a notification from the Japanese government to report for a physical examination. I don't remember the exact date. It was in 1940. And after that I received a notification to report for duty on March 1, 1941.

Q. And this second notice, this notice to report to duty, that was from the Japanese government?

A. Yes.

Q. And in accordance with that notice you reported for duty? A. Yes, sir.

Q. How long did you serve in the Japanese Army?

A. I served until the termination of the war. It was—— [4]

Q. 1945? A. '45.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Mitsugi Nishikawa.)

Q. In August, 1945? A. Yes, sir.

Q. And did you go to the American Consulate after the war? A. Yes, sir.

Q. For what purpose?

A. To obtain a passport to America, United States.

Q. And do you recall when it was that you went to the Consulate?

A. It was about the 1st of December, 1947.

Q. What was the result of that application, Mr. Nishikawa?

A. About a year later——

Mr. Dooley: I object, your Honor, on the ground he hasn't mentioned any application as yet.

The Court: Assuming facts not in evidence?

Mr. Dooley: Yes, your Honor.

The Court: Sustained. Ask another question.

Q. (By Mr. Manes): At that time, Mr. Nishikawa, did you make application to return to the United States?

A. Yes. I made an affidavit. I asked for application but they gave me a paper on what—if I served in the army. I think—— [5]

Q. Well, you attempted to apply to make application, is that correct? A. Yes.

Mr. Dooley: I object to the leading question.

Q. (By Mr. Manes): What was the result of your efforts to return to the United States, Mr. Nishikawa?

A. About a year later I received a certificate of loss of citizenship from the American Consulate.

(Testimony of Mitsugi Nishikawa.)

Mr. Manes: May I have this document marked Exhibit 1 for identification?

The Court: Plaintiff's Exhibit 1 marked for identification.

(The document referred to was marked Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Manes): I show you a document which purports to be a "Certificate of the Loss of the Nationality of the United States," issued to one Mitsugi Nishikawa. Does this relate to you, Mr. Nishikawa? A. Yes, sir.

Q. Is the document which you received from the Consulate in Japan? A. Yes.

Mr. Manes: I offer it in evidence as Exhibit 1.

Mr. Dooley: No objection.

The Court: It may be received. [6]

(The document referred to, marked Plaintiff's Exhibit 1, was received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

Certificate of the Loss of the Nationality of the United States

(This form has been prescribed by the Secretary of State pursuant to Section 501 of the Act of October 14, 1940, 54 Stat. 1171.)

Consulate of the United States of America,
Yokohama, Japan—ss.

I, Douglas W. Overton, hereby certify that, to the best of my knowledge and belief, Mitsugi

(Testimony of Mitsugi Nishikawa.)

Nishikawa was born at Artesia, California, on April 20, 1916.

That he resides at 175 Ojima, Ojima-machi, Nitta-gun, Gumma-ken, Japan.

That he last resided in the United States at Torrance, California.

That he left the United States on August 15, 1939.

That he acquired the nationality of the United States by virtue of birth in the United States.

That he has expatriated himself under the provisions of Section 401(e) of Chapter IV of the Nationality Act of 1940 by serving in the Japanese Army from March 1, 1941, to September 16, 1945, as a Japanese national, such nationality having been acquired at birth.

That the evidence of such action consists of the following: Applicant's affidavit dated December 1, 1947, on file at this office.

In testimony whereof, I have hereunto subscribed my name and affixed my office seal this 16th day of February, 1948.

[Seal] /s/ DOUGLAS W. OVERTON,
American Vice Consul.

Approved by the Department of State under Instruction dated 4/15/49.

Service No. 1264.

Admitted in evidence December 23, 1954.

(Testimony of Mitsugi Nishikawa.)

Mr. Manes: I understand that counsel will stipulate with me that this document is the "Military Service Law of Japan" at the time Mr. Nishikawa, the plaintiff, entered into the Japanese army.

Mr. Dooley: So stipulated.

Mr. Manes: I offer this into evidence as Exhibit No. 2 for the plaintiff.

The Court: It may be received.

The Clerk: Exhibit 2.

(The document referred to, marked Plaintiff's Exhibit 2, was received in evidence.

PLAINTIFF'S EXHIBIT No. 2

In the District Court of the United States, Southern District of California, Central Division

No. 1483-WB

MITSUGI NISHIKAWA,

Plaintiff,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Defendant.

STIPULATION

It Is Stipulated that the Constitution of Japan and the laws of Japan pertaining to service in the Japanese armed forces provide as follows:

The Constitution of Japan

Article 20:

A subject of Japan will obey the laws and have obligations of military service.

(Testimony of Mitsugi Nishikawa.)

The Military Service Law of Japan

Article 1:

Male subjects of the Empire shall serve in the military service as established in this law.

Article 23:

Any person who becomes 20 years old during the time between December 1st and November 30th of the following year, must take the physical examination for conscription, except those to whom special provision of this law is applied.

The age stipulated in the foregoing clause is called the conscription age.

Article 74:

Any person who evades military service by deserting or hiding, injuring wilfully one's body, or aquiring disease and by other acts of fraud, will be punished to penal servitude of 3 years or less.

Article 75:

Persons called for military service who delay entering the barracks for more than 10 days, without any legitimate reasons, shall be punished by imprisonment of 6 months or less; during wartime, when 5 days has elapsed, shall be punished by imprisonment of 1 year or less.

(Testimony of Mitsugi Nishikawa.)

Dated November 29, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTCH,
Chief, Civil Division,
Assistant U. S. Attorney.

WIRIN, RISSMAN & OKRAND.

Admitted in evidence December 23, 1954

Mr. Mangs: No further questions at this time, your Honor.

Mr. Dooley: Your Honor, at this time the defendant would like to make a motion to dismiss. The plaintiff has offered no evidence whatsoever of duress. The only evidence before this court is that he was conscripted in the Japanese army. It is submitted, your Honor, that conscription per se does not constitute duress.

The plaintiff has not testified that he was coerced, forced, that he feared anything; that anyone told him that if he didn't enter the army that he would suffer punishment, or any of the factors of that nature. He has merely stated that he was conscripted in the Japanese army. And on that [7] basis, your Honor, it is felt that plaintiff has not established a prima facie case. And for that reason defendant

(Testimony of Mitsugi Nishikawa.)

makes a motion to dismiss the cause of action.

The Court: Denied.

Cross-Examination

By Mr. Dooley:

Q. Mr. Nishikawa— A. Yes.

Q. —when you went to Japan in August, 1939, how old were you? A. 23 years old.

Q. And you knew at the time that you went to Japan, did you not, that Japan was at war in Manchuria?

Mr. Manes: I object to that as immaterial.

The Court: Overruled.

Q. (By Mr. Dooley): Will you answer the question, please?

A. I didn't think it was war.

Q. Did you know that Japan was fighting in Manchuria? A. Yes.

Q. And you knew, did you not, Mr. Nishikawa, that if you went to Japan you were likely to be drafted in the Japanese army; is that correct?

Mr. Manes: I will object to that on the ground, in the first place, it is immaterial; and in the second place calls for a conclusion; and in the third place it is vague and [8] indefinite.

The Court: Overruled.

The Witness: No, sir.

Q. (By Mr. Dooley): Now, did you make any effort to find out, Mr. Nishikawa, whether you would

(Testimony of Mitsugi Nishikawa.)

be drafted, likely to be drafted in the Japanese army when you went to Japan in 1939?

Mr. Manes: I will object to that again on the ground that it is immaterial. If your Honor please, I would like to make a continuous objection to all these questions because of the same ground.

The Court: The objection is overruled.

The Witness: No, sir.

Q. (By Mr. Dooley): Why did you go to Japan in 1939, Mr. Nishikawa?

A. I went for a visit and to study.

Q. How long did you intend to remain in Japan when you went?

A. Between two to five years.

Q. Between two to five years?

A. To finish my study.

Q. Now, you stated, did you not, Mr. Nishikawa, that in 1940 you received a notice to report for physical examination, is that correct?

A. Yes, sir. [9]

Q. What time in 1940 did you receive that notice?

A. I don't recall the exact date, sir.

Q. Do you recall the approximate date?

A. It was around June, 1940.

Q. June of 1940. And you entered the Japanese army in March of 1941, is that correct?

A. Yes, sir.

Q. Now, between June of 1940, and March of 1941, did you go to the American Consulate and tell

(Testimony of Mitsugi Nishikawa.)

them that you did not want to serve in the Japanese army?

Mr. Means: I will object to that question on the grounds it is immaterial and irrelevant.

The Court: Overruled.

The Witness: No, sir, because I talked to friends of mine and they mentioned the fact that the American Consulate couldn't do anything for dual citizenship of Japanese while in Japan.

Q. (By Mr. Dooley): Between June of 1940, and March of 1941, did you tell any Japanese official that you were an American citizen?

Mr. Manes: I object on the same ground; immaterial.

The Court: Overruled.

The Witness: No, sir.

Q. (By Mr. Dooley): Between June of 1940 and March of 1941, did you make any effort to renounce your Japanese [10] nationality?

Mr. Manes: I object again; irrelevant.

The Court: Overruled.

The Witness: No, sir.

Q. (By Mr. Dooley): Where were you living in Japan, Mr. Nishikawa?

A. I was living in Gumma prefecture.

Q. Near what city is that?

A. Ota, O-t-a City.

Q. Did you communicate with the United States while you were in Japan and before you entered the army?

(Testimony of Mitsugi Nishikawa.)

A. Yes, I wrote letters to my friends in America, United States.

Q. How often did those letters pass between you? A. About once a week, sir.

Q. Did those friends tell you what was going on in the United States?

Mr. Mames: I will object as immaterial.

Mr. Dooley: This is preliminary, your Honor.

The Court: Overruled.

The Witness: I just received news of friends and what they were doing. That's all.

Q. (By Mr. Dooley): You knew, did you not, that on September 16, 1940, the United States was drafting men in the United States Army? [11]

A. No, sir.

Q. Your friends did not tell you that, is that correct? A. Yes, sir.

Q. Did you have any Japanese friends in Japan who were also American citizens?

A. Yes, sir.

Q. Did you ever discuss with them conditions in the United States?

A. No, sir; just whenever we discussed anything it was on what our friends were doing in America. And we didn't have any knowledge of the condition in the United States.

Q. Now, you spoke English when you went to Japan in 1939, did you? A. Yes, sir.

Q. And you read English, did you not?

A. Yes, sir.

(Testimony of Mitsugi Nishikawa.)

Q. Did you read the newspapers between September 16th, 1940, and March of 1941?

A. No, sir.

Q. You didn't read any newspapers?

A. No, sir.

Q. Now, how far did you go in school before you went to Japan in 1939, Mr. Nishikawa?

A. I graduated from the University of California at Berkeley, sir. [12]

Q. And you took up engineering, did you not?

A. Yes, sir.

Q. You didn't read any newspapers between the time that you went to Japan in—pardon me—between September 16, 1940, and March of 1941, is that true?

Mr. Manes: I am going to object to the question on the ground it is unintelligible. It does not say what kind of newspaper: Japanese newspaper or American.

Q. (By Mr. Dooley): Did you read any Japanese newspaper?

A. Japanese newspaper? I couldn't read Japanese characters, so it was—I just didn't—gave up hope of trying to read newspapers.

Q. Did you read the Nippon Times?

A. We were situated out in the country and the Nippon Times wasn't delivered there.

Q. So you didn't do any reading of newspaper at all. Is that your testimony? A. Yes, sir.

Q. You had a father in the United States at that time, too, did you not? A. Yes, sir.

(Testimony of Mitsugi Nishikawa.)

Q. And a mother, too? A. Yes, sir.

Q. Is that correct? A. Yes. [13]

Q. Did you communicate with them?

A. Yes, sir.

Q. How often did you communicate with them?

A. About once in two weeks, sir.

Q. And they didn't tell you about the draft in the United States, either; is that right?

A. No, sir.

Q. Now, when you received your notice to report to the Japanese Army did you protest in any way your entrance in the Japanese army?

Mr. Manes: I object to that as immaterial and irrelevant.

The Court: Overruled.

The Witness: No, I didn't.

Q. (By Mr. Dooley): Now, after you entered the Japanese army, Mr. Nishikawa, to what unit were you assigned?

Mr. Manes: I object to that as immaterial.

The Court: Overruled.

The Witness: I was assigned to the training unit in Niwatsuki for about three or four months. And later I transferred to 60th Air Force Regiment in China, and I served with this regiment the rest—until the termination of the war.

Q. (By Mr. Dooley): Is that also known as the 2378th Bomber Regiment?

A. Yes, sir. [14]

Q. Now, you were first stationed in China, you say? A. Yes, sir.

(Testimony of Mitsugi Nishikawa.)

Q. How long did you remain in China?

Mr. Manes: I am going to object to that question and all other questions pertaining to the service as immaterial on the ground

The Court: Overruled. Oh, excuse me.

Mr. Manes: I wanted to explain.

The Court: The ground is immateriality?

Mr. Manes: Yes, sir. I wanted to explain my reason for the immateriality. And that is to say, once a man is conscripted it matters little what he has done. The army says what he can do once he is in the army. It is a form of coercion, and therefore these questions are immaterial as to whether he entered voluntarily.

The Court: All of his activities in connection with the service are material on the question of whether or not his action was voluntary. Now, insofar as the conscription is concerned, that in itself is not necessarily dispositive of the question of whether or not his action was voluntary. As I have indicated before in these cases the mere fact that he is conscripted, that in and of itself is not necessarily dispositive of the question of whether or not it was voluntary, whether his acts were voluntary.

Now, of course the issue is whether or not his acts, at the time he went into the service and served in the service, [15] whether his acts were voluntary. The only question insofar as those things that occurred subsequent to the time he went into the service, some of those things may and some of them may not be of any probative value to the court in

(Testimony of Mitsugi Nishikawa.)

determining what his state of mind was at the time he went into the service.

As an illustration, I might say that the person who is conscripted in the service and then six months later he is a general and running the Air Corps, let us say, certainly that would be evidence that not only was his service in the army voluntary, not under duress and coercion, but also that his entrance into the service was voluntary.

Mr. Manes: Thank you, your Honor.

Q. (By Mr. Dooley): Now, Mr. Nishikawa, you were first stationed in China, is that correct?

A. Yes, sir.

Q. How long did you remain in China?

A. About six months, sir. It was, I think, in November, that we were shipped out to French Indo-China.

Q. And then how long did you remain in French Indo China?

A. It was in French Indo-China that war broke out with the United States. And after the fall of Singapore we went through Singapore to the Philippines.

Q. When did you get to the Philippines, Mr. Nishikawa? [16]

A. It was in February, about February, 1942.

Q. How long did you remain there?

A. Until the fall of Corregidor. And then we went to Manchuria for our winter training.

Q. Now, what were your duties with this bomber regiment, Mr. Nishikawa?

(Testimony of Mitsugi Nishikawa.)

A. It was mechanic or maintenance man, I think. What we did was; what I did was cleaning up the fuselage; and as far as mechanics is concerned, changing spark plugs and cleaning the inner. That was about the most technical work I did.

Q. And that was a job of some responsibility, was it not?

A. No, sir. There was no responsibility on my concern.

Q. You had quite a bit of engineering training while at the university? A. Yes, sir.

Q. And you used that training on the planes, is that correct? A. No, sir.

Q. Now, this bomber regiment was a part of the Japanese air force, was it not?

A. Yes, sir.

Q. Is it not true, Mr. Nishikawa, that members of the Japanese air force volunteered for the service? [17]

A. No, sir. The noncoms did, but enlisted men were all draftees.

Q. Now, what other duties did you do besides keep the planes in condition?

Mr. Manes: I will object to the question. And I would like to have a standing objection to this line so I won't have to interrupt.

The Court: Objection overruled.

Mr. Manes: May there be a standing objection?

The Court: Make your objection and I will rule on it.

The Witness: K. P. duty, sir.

(Testimony of Mitsugi Nishikawa.)

Q. (By Mr. Dooley): That was on week ends, is that right?

A. No, sir. It came on—the first year or so we had K. P. duty on most every other day, sir.

Q. Now, you were in the Philippines, were you not, at the time of the march from Corregidor?

Mr. Manes: I object as being immaterial and irrelevant.

The Court: Overruled.

The Witness: What was if? March——

Q. (By Mr. Dooley): March from Corregidor?

A. Yes, sir.

Q. And you saw American soldiers there at that time? A. No, sir.

Q. But you knew about the march, is that correct?

A. I didn't know about the march until after the war, [18] sir.

Q. You knew American soldiers were in the Philippines, did you not?

Mr. Manes: I will object as being immaterial.

The Court: Overruled.

The Witness: Yes, sir.

Q. (By Mr. Dooley): Now, at the time that you entered the Japanese army, Mr. Nishikawa, you were a national of Japan, is that correct?

A. Yes. I was a national of Japan because my father registered at the time of my birth in the family register.

Q. Now, when you were in Japan in 1940, between 1940 in June and 1941 in March, is it not true

(Testimony of Mitsugi Nishikawa.)

that all Japanese of American citizenship were urged to return to the United States?

Mr. Manes: I will object to that as calling for information which the plaintiff could not have.

The Court: It might not be. That is why you have to find out. The objection is overruled.

The Witness: No, sir. I haven't heard anything about being urged to go back to the United States.

Q. (By Mr. Dooley): And what were you doing at that time, Mr. Nishikawa?

A. I was working for an aircraft company in Ota.

Q. You hadn't yet commenced your study, had you? [19]

A. I started to study under a tutor in Japanese language and in November, 1939, my father died in the United States and my financial funds was not available; so I had to find a job. And I found a job with this Nakajima Company in Ota.

Mr. Dooley: No further questions, your Honor.

Mr. Manes: I have some questions, your Honor.

Redirect Examination

By Mr. Manes:

Q. How did you get over to Japan, Mr. Nishikawa? A. By boat.

Q. Who furnished your passage?

A. My father, sir.

Q. Did he express any intention to you that he was going to assist you financially in your studies over abroad? A. Yes, sir.

Q. When you worked for this aircraft plant

(Testimony of Mitsugi Nishikawa.)

what kind of aircraft did this plant manufacture?

A. We built DC-3 fuselages, and—well, we just built the body of the planes, sir.

Q. Was this aircraft, at the time the war came on, military aircraft or for transport?

Mr. Dooley: I object to that as leading and suggestive.

The Court: Overruled.

The Witness: It was a transport, sir. [20]

Q. (By Mr. Manes): What were your wages while working for this aircraft plant?

A. 70 yen a month.

Q. How much would that be in American money?

A. $15 a month, sir.

Q. Were you able to save any money on that income? A. No, sir.

Q. Did you know, Mr. Nishikawa when you entered the army there was going to be a war between Japan and the United States?

Mr. Dooley: I object to that as leading and suggestive.

The Court: Overruled.

The Witness: No, sir, I didn't even dream of war with the United States. I didn't think Japan was foolish enough to declare war on the United States, after seeing the production of equipment in Japan. And I thought that only a crazy fool could think that Japan would win a war——

Mr. Dooley: I object and ask that the portion of the answer that is not responsive be stricken; except the "did you know" and the yes or no. I ask that be stricken, your Honor.

(Testimony of Mitsugi Nishikawa.)

The Court: Denied.

Q. (By Mr. Manes): Now, you indicated under cross-examination, Mr. Nishikawa, that you did not protest against your induction into the [21] army——. A. Yes.

Q. ——and that you did not protest against the taking of a physical examination?

A. Yes, sir.

Q. Will you state to the court why this was so?

A. I was afraid to.

Q. Why were you afraid?

A. I heard rumors—rumors were going around that Kempi Tai went to houses that tried to dodge the draft and take them up to prison; or even there was one rumor that one fellow, he hid in the warehouse and these Japanese kori, which is a straw trunk, and one Kempi Tai had an idea he was in there and with the boy's father and mother, he went into the warehouse and bayoneted these trunks and this fellow was killed.

Q. Did you believe these rumors?

A. Well, at that time the Japanese government—Japanese army was coming into control of the Japanese government and even the high officials were killed in their homes. So I had no alternative. But it might have been true.

Q. Now, when you were in the army, Mr. Nishikawa, what was your attitude toward the United States? Who did you think would win the war?

A. I always thought the United States would win it. And when I was in French Indo-China when war was declared [22] with the United States, and

(Testimony of Mitsugi Nishikawa.)

noncoms came to me and asked the question since I was born and raised in the United States and also know something about Japan, what would be the outcome of the war. And I told them there wouldn't be any chance of Japan winning the war at all. When that notification came I thought I was a dead duck then because to my mind war with the United States wasn't possible at all.

Q. Did anything happen as a result of that conversation between you and the noncommissioned officers on that particular date that you started relating?

A. That night I was called up by the enlisted personnel of higher rank and was given a thorough beating.

Q. Were any other acts of brutality committed against you after that occasion?

A. I was beaten for about almost every day for a month; and a couple days a month after I was beaten.

Q. While you were serving in the Japanese army did you have a nickname?

A. They called me "America," sir.

Mr. Manes: If the Government will permit me, I would like to refer to a document purporting to be an application for passport to Japan. I would like to have that marked plaintiff's exhibit next in order for identification.

The Clerk: Plaintiff's Exhibit No. 3 for identification. [23]

(The document referred to was marked Plaintiff's Exhibit 3 for identification.)

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PLAINTI Plaintiff's Exhibit No. 3

...l fee for a passport is $... ...ney order, and $1 for ...

...ee is $16. It is unnecessary to pay any ...e any person in connection with the filing ...ecution of this application or for obtaining ...sport. All necessary information and guidance will be given applicant by the clerk of court or Passport Agent before whom this application must be executed.

P...SSPORT APPLICATION S... FRANCISCO ...ERIES

FORM FOR NATIVE CITIZEN

[Edition of 1939]

Execute and attach PART TWO if members of family are to be included in passport

No. 2632

Dated AUG 4 - 1939

Issued by San Francisco Agency upon authority contained in Department's telegram dated AUG 4 - 1939

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UNITED STATES OF AMERICA
STATE OF CALIFORNIA } ss:
COUNTY OF LOS ANGELES

I, Mitsugi Nishikawa (Name in full) MITSUGI NISHIKAWA, a CITIZEN OF THE UNITED STATES, do hereby apply to the Department of State, at Washington, for a passport. I solemnly swear that I was born at Artesia (Town or city), (Province or county) California (State or country), on April 20, 1916 (Date)

My father, Jumpichi Nishikawa (Name), was born at Japan on Jan. 1, 1874, and is now residing at Torrance, California

I am domiciled in the United States, my **permanent residence** being at Sepulveda & Normandie (Street address) in Torrance, California (Town or city), State of California

I {~~have~~ have not} been naturalized as a citizen of a foreign State. I {~~have~~ have not} taken an oath of allegiance to a foreign State.

(If applicant took an oath of allegiance to, or was naturalized in a foreign State, a supplementary statement, under oath, should be attached)

THIS PORTION TO BE FILLED IN BY AN APPLICANT WHO WAS BORN ABROAD, OR WHOSE FATHER WAS BORN ABROAD

(See footnote at bottom of page 2)

I have resided outside the United States as follows:

(State name of, and period of residence in, each foreign country)

..... from .....

..... from ..... to .....

(Name of countries)

(The following portion in this block to be filled in only by a person whose father was not born in the United States)

My father emigrated to the United States on or about ..... (Month), 1900 (Year), resided 35 years continuously in the United States from 1900 to 1939, and was naturalized as a citizen of the United States before the ~~No~~ Court of .....

at ..... (City) ..... (State) on ..... (Month and day), 1 ..... (Year)

A WOMAN APPLICANT MUST FILL IN THIS PORTION

I was {never married. / ~~last~~ married on ..... to .....

Mitsugi Nishikawa (To be printed in full by applicant for passport)
(Surname) (First name) (Middle name)

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My last passport was obtained from None (Insert Washington, or location of office abroad) on (Date)

and is submitted herewith for cancelation (Give disposition of passport if it cannot be submitted)

I intend to visit the following countries for the purposes indicated:

Japan (Names of countries to be visited) Study & visit (Purposes of visits)

and I intend to return to the United States within 5 {months. years.

ADDRESS

I request that my passport be mailed to the following address:

[NOTE.—A passport will not be mailed to a hotel address unless the hotel is the applicant's place of permanent residence.]

PRINT

Name Mitsugi Nishikawa

Number and street Rt 1 Box 212

City and State Torrance, Calif.

DESCRIPTION AND PHOTOGRAPH OF APPLICANT

Height 5 **feet,** 7 **inches.**

Hair Black

Eyes Brown

Distinguishing marks or features None (Note any marks or scars on hands or face by which applicant may be identified)

Place of birth Artesia California (City and State)

Date of birth April 20, 1916 (Month, day, and year)

Occupation Farmer

I solemnly swear that the statements made on both sides of this application are true and that the photograph attached hereto is a likeness of me.

OATH OF ALLEGIANCE

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation, or purpose of evasion: So help me God.

Drivers License R9793o

Mitsugi Nishikawa (Signature of applicant)

Subscribed and sworn to before me this ..... day of ....., 19.....

(Testimony of Mitsugi Nishikawa.)

Q. (By Mr. Manes): Mr. Nishikawa, I am going to show you a document which purports to be a passport application purportedly executed by one "Mitsugi Nishikawa." A. Yes, sir.

Q. Is that your signature?

A. That is my signature, sir.

Q. And these questions that are asked here and answers given in here, were those your answers?

A. Yes, sir.

Q. And they were given sometime in August, 1939? A. Yes, sir.

Mr. Manes: I would like to introduce this into evidence as Plaintiff's Exhibit next in order.

Mr. Dooley: I object on the ground that the document is a statement made by the plaintiff at some future time and is self-serving and immaterial and irrelevant.

The Court: It is hearsay. Sustained.

Mr. Manes: If your Honor please, may I point out to the court that in one of the questions in this document is "I intend to visit the following countries for the purposes indicated: Japan——"

Mr. Dooley: I object to the plaintiff reading into evidence from documents that have not been admitted. [24]

The Court: He is not reading it into evidence. He is offering it into evidence.

Mr. Manes: For the purpose of "study and visit and I intend to return to the United States within 5 (months) 5 (years)." It doesn't say which here.

(Testimony of Mitsugi Nishikawa.)

Now, the point is that in 1939 when he made that statement, that shows an intention which corroborates his testimony given on the stand this morning and for that purpose we offer it. It is certainly material.

The Court: It is elementary, counsel; a self-serving statement and not admissible in evidence.

The simplest way to bring to your attention the point that is involved is if some person were going to Russia today for the purpose of delivering state secrets and in their passport said that they were going over there, that their purpose in going over there was to help the United States, but subsequently they were charged with treason, you don't think their statement that they said they were going to help the United States would be admissible, do you?

In other words, what he said is not admissible. It is hearsay, and it is self-serving. Here under oath he may testify as to his purpose in going, as he has testified. You may proceed. [25]

Mr. Manes: Thank you, your Honor.

Q. (By Mr. Manes): Mr. Nishikawa, between the time that you took the physical examination and the time that you reported for duty, did you have funds with which to return to the United States?

A. No, sir.

Q. Now, you have also mentioned on cross-examination, Mr. Nishikawa, that you were advised that the Consulate probably could not help you with

(Testimony of Mitsugi Nishikawa.)

respect to returning to the United States after you once received your notice for physical examination. Do you know whether any of those friends that discussed that with you were employed by the American Consulate?

Mr. Dooley: I object. Well, I will withdraw the objection.

The Witness: Yes, sir. One nisei friend I had mentioned the fact that the American Consulate can't do anything for a dual nationality person. He was employed by the embassy at Tokyo, sir.

Q. (By Mr. Manes): Was that an official or unofficial conversation?

A. Unofficial conversation.

Q. Is your mother now living in the United States, Mr. Nishikawa?

Mr. Dooley: I will object to that on the ground it is immaterial and irrelevant. [26]

The Court: Sustained.

Mr. Manes: I have no further questions.

Mr. Dooley: I have one or two questions, your Honor.

Recross-Examination

By Mr. Dooley:

Q. Mr. Nishikawa, at the time that you heard these rumors that you testified to did you check those rumors with any American official in Japan?

A. No, sir.

Q. Did you check those rumors with any Japanese official in Japan? A. No, sir.

(Testimony of Mitsugi Nishikawa.)

Q. Now, Mr. Nishikawa, before you entered the Japanese Army were you coerced in any way by the Japanese police?

Mr. Manes: I will object as vague and indefinite, what he means by the word "coerced."

The Court: Overruled.

The Witness: The Japanese police were checking—they were having monthly checks on my boarding house. But I never come in contact directly with the police. I tried to stay away from them.

Q. (By Mr. Dooley): I call your attention to what purports to be an application for certificate of identity and ask you if this is your signature?

A. Yes, sir. [27]

Q. And did you sign this document on the 9th day of January, 1953? A. Yes, sir.

Q. On the date it bears? A. Yes, sir.

Q. And did you——

Mr. Manes: May I see the document a moment?

Mr. Dooley: I am sorry, counsel.

Q. (By Mr. Dooley): I will read a statement on this document and ask you whether it is correct: "Though my service was involuntary there was no coercion by the Japanese police."

Is that statement correct?

Mr. Manes: I will object to the question on the ground, in the first place, there is nothing inconsistent with that statement and the testimony of the witness——

Mr. Dooley: I am just trying to verify the witness' testimony.

(Testimony of Mitsugi Nishikawa.)

Mr. Manes: Could I have a ruling, your Honor?

The Court: What is it being offered for?

Mr. Dooley: To refresh the witness' recollection and get a direct statement, perhaps.

The Court: Well, ask him if that refreshes his recollection.

Q. (By Mr. Dooley): Does that refresh your recollection, Mr. Nishikawa? [28]

A. Yes, sir. I told them at the Consulate my services were involuntary. But they said since the police didn't come and pick me up or do anything it was not through coercion and they put that statement in.

Mr. Dooley: No further questions, your Honor.

Mr. Manes: I have one question.

Redirect Examination

By Mr. Manes:

Q. Mr. Nishikawa, after the war what did you do?

Mr. Dooley: I will object to that on the grounds of immaterialty and irrelevancy.

The Court: Sustained.

Mr. Manes: No further questions, your Honor.

The Court: Mr. Nishikawa, you say that at the time you went into the Army you didn't even dream that there would be a war between Japan and this country, is that correct?

The Witness: Yes.

The Court: That was in March, 1941?

(Testimony of Mitsugi Nishikawa.)

The Witness: Yes, sir.

The Court: You are a graduate of the University of California?

The Witness: Yes, sir.

The Court: You have a degree in engineering?

The Witness: Yes, sir.

The Court: Now, you know, do you not, that at that time [29] there was what was known as a "cold" war between Japan and the United States?

The Witness: No, sir.

The Court: Do you know that at that time there was war being waged in Europe?

The Witness: Yes, sir.

The Court: And you know that there were two factions waging that war; one commonly referred to as the axis faction, Germany, Italy——

The Witness: Yes, sir.

The Court: And the allies, France and England —you knew that?

The Witness: I knew there was a war, but I didn't have any information as to the outcome.

The Court: You knew that there was a threat of war between Japan and the United States, didn't you?

The Witness: No, sir.

The Court: You were a university graduate?

The Witness: Yes, sir.

The Court: Didn't you ever read the newspapers?

The Witness: I usually read the sports page, but that's——

(Testimony of Mitsugi Nishikawa.)

The Court: You never ever read anything but the sports page, is that right?

The Witness: Well, I didn't take have much interest in politics. [30]

The Court: Or in national affairs?

The Witness: No, sir.

The Court: You didn't take any interest in national affairs, in Japanese national affairs, or you didn't take any interest in the national affairs of the United States, is that right?

The Witness: Yes, sir. Well, while I was in the United States I took interest in American national affairs; but while in Japan I didn't have any interest at all in Japanese national affairs.

The Court: And in June, 1940, when you were told that you were to be drafted into the Japanese army, between June, 1940, and March, 1941—a period of almost a year—you didn't make any effort to find out whether an American citizen—you knew you were an American citizen?

The Witness: Yes, sir.

The Court: You didn't make any effort to find out whether an American citizen was required to go into the Japanese army. And the reason that you didn't make any effort was that you heard rumors that the Kempi Tai would beat you if they found that you didn't want to go into the army: is that your testimony?

The Witness: Yes, sir. Also, this nisei friend of mine that was employed in the embassy stated

(Testimony of Mitsugi Nishikawa.)

the fact that dual citizen niseis, the American Consulate couldn't do anything [31] for the citizen nisei.

The Court: So, even though you were a United States citizen you made no effort at all to find out whether you could get out of serving in the Japanese army when you didn't want to serve in the Japanese army? They could force you to even though you didn't want to? They could force an American citizen to serve in the army?

The Witness: Yes, sir.

The Court: During the time that you got your education in this country you went to high school before you went to the university?

The Witness: Yes, sir.

The Court: And then the university. Were you taught anything about the constitution of the United States, of this country?

The Witness: Yes, sir.

The Court: Were you taught anything about the history of this country?

The Witness: Yes, sir.

The Court: The background of this country?

The Witness: Yes, sir.

The Court: And then you believed that as an American citizen that Japan could force an American citizen into the army and there wasn't anything that you could do about it, is that right? [32]

The Witness: That is right; when an employee of the embassy tells me that.

(Testimony of Mitsugi Nishikawa.)

The Court: Some friend of yours told you that?

The Witness: Yes, sir.

The Court: But you made no effort to find out officially, made no effort——

The Witness: He also mentioned the fact that if I went to them the Japanese police would find out about it and I would be in trouble later.

The Court: In other words, he told you that if you went to the officials of your own country, the United States——

The Witness: Yes.

The Court: ——that the Japanese police would find out about it and they would beat you; right?

The Witness: Yes.

The Court: So for that reason, against your will, you, as a United States citizen, permitted them to force you into the Japanese army?

The Witness: Yes, sir.

The Court: Is that what I am to believe?

The Witness: Yes, sir.

The Court: Very well. That is all. You may step down.

(Witness excused.)

The Court: Do you rest?

Mr. Manes: I would like to make argument, your Honor. [33]

The Court: You rest, though?

Mr. Manes: Yes, your Honor.

The Court: Do you rest?

(If applicant took all oath of allegiance to, or was naturalized in a foreign ...)

THIS PORTION TO BE FILLED IN BY AN APPLICANT WHO WAS BORN ABROAD, OR WHOSE FATHER WAS BORN ABROAD

(See footnote at bottom of page 2)

I have resided outside the United States as follows:

(State name of, and period of residence in, each foreign country)

....., from .....

....., from ..... to .....

(Name of countries)

(The following portion in this block to be filled in only by a person whose father was not born in the United States)

My father emigrated to the United States on or about ....., 1900, resided 35

(Month) (Year)

years continuously in the United States from 1900 to 1939, and was naturalized as a citizen of the United

States before the ..... Court of .....

at ..... on ..... 1.....

(City) (State) (Month and day) (Year)

A WOMAN APPLICANT MUST FILL IN THIS PORTION

I was { never married. / last married on ..... to .....

who was born at ..... on ....., who { is / is not } an American citizen,

and who is now residing at .....

Our marriage { has not been terminated. / was terminated by (death) (divorce) on .....

(Date of death or divorce)

My maiden name was ....., and

(Name)

I { was not previously married. / was previously married to .....

(Full name of former husband)

on ....., at ....., who was born

(Date) (City and State)

at ....., and the marriage was terminated by { death / divorce } on .....

(Date)

(If married more than twice, set forth facts in a supplemental statement)

My { husband / former husband } emigrated to the United States on .....

and { his father ..... / he } was naturalized as a citizen of the United States before the

(Name of father)

..... Court of ..... at .....

(City and State)

on ..... as shown by the Certificate of Naturalization { submitted herewith. / previously submitted.

(Month, day, and year)

I intend to leave the United States from the port of Los Angeles

(Port of departure)

on August 14, 1939, sailing on board the Kamakura Maru

(Date of departure) (Name of ship)

NOTE.—Any additional information necessary to clarify the citizenship status of applicant may be incorporated in a supplemental affidavit which will be considered a part of this application.

(OVER) 1—1477

(Full name) (Middle name)

(To be filled in by applicant for passport)

10823

RSC'd

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Eyes brn. brn.

Distinguishing marks or features None
(Note any marks or scars on hands or face

by which applicant may be identified)

Place of birth Artesia California
(City and State)

Date of birth April 2, 1916
(Month, day, and year)

Occupation Farmer

I solemnly swear that the statements made on both sides of this application are true and that the photograph attached hereto is a likeness of me.

OATH OF ALLEGIANCE

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation, or purpose of evasion: So help me God.

Drivers License
R 91930

Matsuyo Nishikawa
(Signature of applicant)

Subscribed and sworn to before me this ..... day of ....., 19.....

[SEAL OF COURT]

Clerk of the ..... *Court at* .....

AFFIDAVIT OF IDENTIFYING WITNESS

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature hereto affixed; that I know the applicant who executes the affidavit hereinbefore set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of ~~my knowledge and belief; further~~, I solemnly swear that I have known the applicant personally for 10 years.

If witness has been issued a passport, give number if known and date or approximate date of issue.

No. ..... **Date of issue** .....

No lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

Nida Takayama
(Signature of witness)

not related
(Relationship to applicant, if not related, so state)

Rt 1 Box 212 Torrance, Calif
(Residence address of witness)

Subscribed and sworn to before me this ..... day of ....., 19.....

[SEAL OF COURT]

Clerk of the ..... *Court at* .....

NOTE.—If applicant was born outside the United States on or after May 24, 1934, of an alien father and an American mother, a supplemental affidavit will be required giving the name and date and place of birth of mother as well as complete data concerning how and on what date she acquired American citizenship.

U. S. GOVERNMENT PRINTING OFFICE 1—1458

40

Drivers license
7/13/39 (temporary)

44

Mr. Dooley: Yes, your Honor.

The Court: All right, you may make your argument.

Mr. Manes: If the court please, the court has expressed itself on a number of occasions in dealing with situations involving American citizens who have entered and were drafted in the Japanese army. Of course, we have attempted to point out to the court—suggest to the court what we believe to be the law; that where a person is actually and physically inducted into the army that this in itself constitutes duress, sufficient duress to result in involuntary conduct.

We feel, as a matter of fact, that there is good legal authority for this proposition, and it is particularly pertinent to this case that we refer to Lehmann vs. Acheson, 206 F. 2d 592, because in that case there were facts present very similar to these. There the plaintiff registered with the Swiss Consulate or Swiss draft board when he was 18, and subsequently, or two or three years later he served in the Swiss army. Now, he did so in compliance with the law of Switzerland and because, of course, he had dual nationality.

Now, one of the factors which the court of appeals noted was that he did not protest at the time he entered the Swiss army or at the time he took the oath of allegiance. [34]

Another omission which the court had relied upon below was the fact that on his 1951 visit to the American Consulate he had failed to furnish proof

of his birth; and he did not ask for the protection of the American Consulate and expressed no desire to register as an American citizen.

Now, the court, at page 596 goes on to say that

> "With respect to these 'omissions' it need only be said that they were utterly irrelevant to the critical issue of 'voluntariness.'"

The point is aside from the facts presented in this case surrounding the plaintiff's entrance into the Japanese army. The fact is that he was drafted. And if he had not obeyed the law to submit himself to the draft he would have been punished under the laws of Japan. The courts have consistently held in these types of situations that the plaintiffs here are doing no more than they are required to do under legal duress; namely, complying with a law of the state of which they are a national.

Now, counsel for the Government in a trial memorandum, which incidentally was submitted not in compliance with Rule 12 because it did not come within the five days set out in that rule, and because of that fact we couldn't reply to it in written statement—but in any event counsel alludes to Section 802 of the Nationality Act of 1940 and attempts to—at least as I read it—he attempts to say that where [35] the plaintiff has stayed in Japan for more than six months and subsequently serves in the army of that state of which he is a national, that a presumption arises that he has expatriated himself.

Well, the fact of the matter is that this particular section has been ruled upon frequently by the courts, by no less authority than the Supreme Court in Kawakita vs. the United States, as well as by the Court of Appeals in Dos Reis vs. Nichols, 161 F. 2d. And in both of those cases, as well as in others, the court has said that it must still be shown that expatriation was voluntary or involuntary, and a showing of involuntary expatriation rebuts the Section 802 presumption. In other words, what these courts are saying is that 802 does not enlarge 401(c).

Of course, I realize that the Hamamoto case confronts us this morning. I think that Hamamoto is distinguishable. But in any event, I think that this court can well consider the factors here of a man who went to Japan earlier than Hamamoto did, in 1939, for a specific purpose, to visit and to study and who attempted to study. We know—certainly the court knows from its long experience in these cases—the circumstances surrounding, the conditions surrounding the plaintiff in Japan prior to the war. The court may take judicial notice of the fact, as a matter of fact, that much of the news which we may have known about here was not known [36] to people living in Japan in those days.

The fact remains that after his father passed away he attempted to provide for himself until such time as he could return to the United States; that he was caught up in the tentacles of war. It was not his fault. The fact that he had to stay

there and could not return to the United States is not his fault. And I would like at this time to point out that even if the plaintiff had gone to the American Consulate and had asked the American Consulate what he could do, what the Consulate could do, he couldn't return anyway because he didn't have any money. But I must suggest, however, that this is not a requirement which ought to be imposed or which is imposed upon the plaintiff, the requirement to go to the Consul.

Now, of course once he has served under the circumstances of induction, of responding to a draft notice—and there is no evidence to the contrary that he did not do so—we submit that anything that may have happened thereafter so far as the service is concerned is immaterial because he is there by obeying the military law and he is subject to punishment if he does not obey it. And this court has held on a number of occasions that we do not require of our citizens that they become martyrs in an effort to protest against their military service.

I would like, finally, to refer to several cases which [37] present analagous situations to the one here.

In Mandolla vs. Acheson, decided by the Supreme Court, we had facts where a plaintiff over 21 was conscripted in 1931 in Italy and served in the army, and at the same time took an oath of office. Now, it is true that at that time there wasn't a 41(c), but there was, however, a prohibition against taking of oath, subject of course to the penalty of expatriation. The court pointed out in that case that the

choice of taking the oath or violating the law was for a soldier in the army of fascist Italy no choice at all, and I submit that it is rather inconsistent—and incidentally I might add that the Attorney General joined the court in this particular language—and I submit that it is rather inconsistent, if not immoral, for the court now—for the attorney for the Government to now come before the court and suggest that in conduct similar to that of Mandolla's that the plaintiff has in fact expatriated himself.

But to go further, we have Lehmann vs. Acheson and Perry vs. Dulles, both of which involve cases or situations of induction into the army of respective nations of which they were a national at a time when they knew of the service of impending induction and failed to take the kind of action which the Government suggests ought to have been taken, and who yet were found to have not lost their citizenship. Why? Because they responded to the draft law of that particular [38] country.

It is significant, as a matter of fact, that the Third Circuit in the Perry vs. Dulles case says that once the plaintiff has shown that he was inducted, that he responded to a draft call, that this creates a prima facie case for conscription for legal duress and that the way the Government was then rebuffing it was by showing that he could have legally escaped.

I submit, your Honor, that on two grounds the plaintiff deserves to retain his citizenship; on the factual ground, the testimony from himself, the evidence presented to this court by the plaintiff;

and secondly by virtue of the law as this court knows and understands it.

The Court: Well, of course, the short answer to the entire argument, counsel, is that the court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony.

He went to Japan when he was 23 years of age. He remained in Japan, and the entire world was in a turmoil all the time he was in Japan. War is being waged in Europe. He is 23 years old. This isn't a case of a young boy that was taken to Japan in the early days like most of these cases, where a young boy was taken to Japan as an infant and he was reared in Japan and caught over there during the war and then was drafted into the service. Of course, there wasn't anything [39] he could do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail.

We don't have a situation like that. We have a young man who wasn't forced, in the first place, wasn't forced to go over to Japan, because he wasn't a child. He was 23 years old. He was a graduate from one of our greatest institutions of learning in this country with an engineering degree. And he went over there, and he knew he was registered over there in the family register, and he went over to do his duty as a Japanese national. That was the very purpose. That is why Congress enacted that legislation.

How ridiculous for me to believe his story that in the summer of 1940, when he was notified to

report, that for a year he didn't do anything to leave Japan and didn't make any effort to leave Japan. He didn't go to see the American authority. And mind you, this is a university graduate. This isn't a young fellow that is confused and lost and doesn't know his way around. This is a university graduate. And because someone told him that the Kempi Tai would beat him up if he tried to get out or if he spoke to the Americans. He just refrained from protecting his rights as a citizen. He made no effort to return to this country. If it were a plot in the wildest sort of a television story it couldn't be believed, couldn't be accredited by anyone seeking the [40] truth. The court simply does not believe that testimony. That is all there is to the case.

I believe this: He went into the service because he wanted to go into the service. I believe he went to Japan, and I believe that he waited for them to call him to the service, because under the laws of Japan that's the manner in which they took their men into the service under the draft laws, the conscription laws. That was their system of building up their armed forces. So do you think that when Congress passed this legislation that Congress had in mind that it doesn't apply to Japan, that all you need do is pass conscription laws and as long as you pass conscription laws they can go over there and wait for them to be conscripted and they don't lose their citizenship? It's ridiculous on its face.

Mr. Manes: Will your Honor permit me just two brief remarks?

The Court: Yes, sir.

Mr. Manes: Your Honor, in the first place this plaintiff went to Japan in 1939. The Nationality Act of 1940 was not passed until 1940 and did not become effective until January 23, 1941. So of course he did not have before him the law until 1941.

The Court: I am not talking about his being familiar with the law. All I am saying is that is why Congress passed [41] the law, because he and others like him went over to Japan to serve in the Japanese army; because he received his education in the public schools of this country and in the University of California, and then went over to serve in the Japanese army. Now, that is why Congress adopted those provisions of the law.

Now, I am not saying that he knew that or he knew that Congress would adopt those provisions of the law. I am not even saying that he knew when he went into the army that he would have lost his citizenship. All I am saying is that he went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. He went over there to serve his hitch in the army. He went over and he waited until they reached him on the draft, and when they did he was drafted. And that is what he was there for. And his service could not be considered involuntary. Reference has been made to 1940, and when he was notified in 1940 did he get out? Because then he was notified to report. And for a year between 1940 and 1941 he made no effort to get out. He made no effort to leave the country. We just happen

to say 1940 because that is the time he said he was notified. But it isn't necessary to say 1940. The fact is that he, a university graduate, a man with that education, he must have known even before they told him, he must have known that they have armies and he must have known [42] that they conscript men in those armies. He must have known, and he testifies that he knew, that he was registered in the family register over there. He knew, and he has testified he knew, he had dual nationality. He knew he was going to be drafted. So even before they notified him it was his turn he knew and he was waiting for it. He waited for it for the time he was there. He was waiting for that draft, for that call to serve. He made no effort to leave there.

If you were in a foreign country and you were notified that you were going to be drafted and you did nothing about leaving the foreign country, did nothing about contacting the American officials, and then you said to me, "I was afraid to"; don't you think that I would be justified in thinking you were a little stupid or something was wrong with you, that you needed a little mental attention?

Mr. Manes: If your Honor please, I don't think that that would be the situation where I knew that the circumstances in the particular country of which I was a national were such that a protest would have been futile or might have been dangerous. And, of course, that has been the situation in Japan.

The Court: Well, in other words, you mean that you, being a citizen of the United States, you would be afraid?

Mr. Manes: I might be. It is conceivable that I might be afraid. [43]

The Court: In other words, you would go and serve in that army of that foreign nation because you were afraid you would be beat up if you spoke to the officials of your own country?

Mr. Manes: I might. I don't know.

The Court: The judgment will be for the defendant.

Mr. Dooley: Thank you, your Honor.

Mr. Manes: If your Honor please, could I have a ruling, also, on the constitutionality of this Act, Provision 401(c)? I would like to raise the argument before the court now that it is unconstitutional——

The Court: You have a ruling here. I have found for the defendant, which of course necessarily follows that you have a ruling on it.

Mr. Manes: I thought I would raise it to the court for a specific ruling.

The Court: That is right. You have a ruling on it, in accordance with the finding for the defendant, that the law is constitutional.

Mr. Manes: Thank you, your Honor.

(Whereupon at 11:45 o'clock a.m. the above-entitled matter was concluded.) [44]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of April, 1955.

/s/ DON P. CRAM,
Official Reporter.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 21, inclusive, contain the original:

Complaint:
Answer to Plaintiff's Complaint;
Order on Stipulation for Substitution of John Foster Dulles, as Secretary of State, as party defendant;
Findings of Fact and Conclusions of Law;
Judgment;
Notice of Appeal;
Designation of Contents of Record on Appeal;

and a full, true and correct copy of the Minutes of the Court on Dec. 23, 1954; which, together with the original plaintiff's exhibits 1, 2, and 3; and one volume of Reporter's Transcript of Proceedings had on Dec. 23, 1954, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in said cause.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 25th day of April, 1955.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14742. United States Court of Appeals for the Ninth Circuit. Mitsugi Nishikawa, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14742

MITSUGI NISHIKAWA,

Plaintiff and Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Defendant and Appellee.

AMENDED STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Pursuant to Rule 17(6) of this Court, appellant files the following as his statement of points on appeal:

1. The trial court erred in giving judgment for the defendant;

2. The trial court erred in failing to adjudge that plaintiff is a national of the United States and that he did not lose that nationality by reason of his having served in the Japanese Army;

3. The trial court's findings number III, VII, and VIII are not supported by the evidence;

4. The trial court erred in its conclusion number III;

5. The trial court erred in ruling that 8 USC 401(e) is constitutional.

6. The trial court erred in refusing to admit into evidence plaintiff's exhibit 3, for identification.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,

Attorneys for Plaintiff and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF THE RECORD WHICH IS MATERIAL TO THE CONSIDERATION OF THE APPEAL

Pursuant to Rule 17(6) of this Court, appellant hereby designates as the record which is material to the consideration of the appeal, the entire Clerk's transcript and Reporter's transcript as certified to this Court, including exhibits 1, 2, and 3.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,

Attorneys for Plaintiff and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 20, 1955.

[fol. 64] Argument and Submission—May 21, 1956 (omitted in printing)

[fol. 65] In United States Court of Appeals for the Ninth Circuit

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—June 18, 1956

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 66] In United States Court of Appeals for the Ninth Circuit

No. 14,742

Mitsugi Nishikawa, Appellant

vs.

John Foster Dulles, as Secretary of State, Appellee

Appeal from the United States District Court
for the Southern District of California
Central Division

Opinion—June 18, 1956

Before: Chambers, Circuit Judge, and Solomon and Hamlin, District Judges

Hamlin, District Judge:

This is an appeal from a judgment of the District Court decreeing that the appellant Nishikawa, who was born in the United States, lost his United States citizenship by entering and serving in the Armed Forces of Japan from March 1, 1941 to September 6, 1945, and denying appel-

lant's prayer for judgment that he is a national of the United States.

The action was begun when Nishikawa filed a complaint for a judgment declaring that he was a national of the United States under §503 of the Nationality Act of 1940, 8 U.S.C.A. §903, 1946 Ed.[1] The complaint alleged that he was born in the United States on April 20, 1916 and that on August 15, 1939 he went to Japan for the purpose of education and experience in the engineering field and that his intention was to return to the United States. The com- [fol. 67] plaint further alleged that on or about March 1, 1941, plaintiff was conscripted into the Japanese army and served in that army until August, 1945, and that his service in said army was due to the Japanese conscription law and was the result of coercion, and was not the plaintiff's free and voluntary act. The defendant answered and admitted that the plaintiff had served in the Japanese army during the above dates at a time when the plaintiff was a national of Japan, and denied that such service was not a free and voluntary act of the plaintiff, denied that it was the result of coercion, and denied that it was due to the Japanese conscription law. The answer specifically alleged that such service was the free and voluntary act of the plaintiff.

On the trial of the matter, the plaintiff was called as the first and only witness. He testified, in substance, as follows: Until he went to Japan in 1939 he had resided and gone to school in the United States, graduating from the University of California with a degree in engineering. His parents then resided in the United States and his father had registered him in the family register in Japan when he was born. He stated he intended to stay two to five years in Japan to visit and to study. When he went to Japan he knew that Japan was fighting in Manchuria. In Japan he started to study under a tutor in Japanese language. His father died in November, 1939, and funds were not available and he found a job in an aircraft plant in Ota. About June of 1940 he received a notice to report for his

[1] This section was repealed by the Immigration and Nationality Act of 1952, and is now covered by 8 U.S.C.A. §1503.

physical examination pursuant to army service and he was inducted into the Japanese army in March, 1941. Between those dates he did not contact or attempt to contact any American or Japanese official, nor did he at any time protest his induction. At no time did he tell any Japanese or American official that he was a United States citizen. He had heard rumors that the Kempi Tai (Secret Police) beat up persons who attempted to avoid conscription, and a friend of his who worked at the American embassy told him that the consulate could do nothing for dual nationals, such as he was. When asked if he believed the rumors about the Kempi Tai, he stated:

> "Well, at that time the Japanese government Japanese army was coming into control of the Japanese government and even the high officials were killed in their homes. So I had no alternative. *But it might have been true.*" [Emphasis added.]

[fol. 68] He testified that he knew nothing about the conscription of men in the army in the United States in September, 1940, or of conditions in the United States, and that he was not told of these matters in letters from home and they were not discussed among his United States citizen friends in Japan.

He testified, in part, as follows:

> "Q. Now, you stated, did you not, Mr. Nishikawa, that in 1940 you received a notice to report for physical examination, is that correct?
>
> A. Yes, sir.
>
> * * * * * * *
>
> Q. Do you recall the approximate date?
>
> A. It was around June, 1940.
>
> Q. June of 1940. And you entered the Japanese army in March of 1941, is that correct?
>
> A. Yes, sir.
>
> Q. Now, between June of 1940, and March of 1941, did you go to the American Consulate and tell them that you did not want to serve in the Japanese army?
>
> * * * * * * *

The Witness: No, sir, because I talked to friends of mine and they mentioned the fact that the American Consulate couldn't do anything for dual citizenship of Japanese while in Japan.

Q. By (Mr. Dooley): Between June of 1940 and March of 1941, did you tell any Japanese official that you were an American citizen?

. . . . . .

The Witness: No, sir.

Q. (By Mr. Dooley): Between June of 1940 and March of 1941, did you make any effort to renounce your Japanese nationality?

. . . . . .

The Witness: No, sir.

. . . . . .

Q. Did you read the newspapers between September 16th, 1940, and March of 1941?

A. No, sir.

Q. You didn't read any newspapers?

A. No, sir.

[fol. 69] Q. Now, how far did you go in school before you went to Japan in 1939, Mr. Nishikawa?

A. I graduated from the University of California at Berkeley, sir.

Q. And you took up engineering, did you not?

A. Yes, sir.

. . . . . .

Q. Now, when you received your notice to report to the Japanese army did you protest in any way your entrance in the Japanese army?

. . . . . .

The Witness: No, I didn't.

Tr. pp. 26-30

* * * * * * *

Q. (By Mr. Manes): Now, you indicated under cross-examination, Mr. Nishikawa, that you did not protest against your induction into the army—

A. Yes.

Q. —and that you did not protest against the taking of a physical examination?

A. Yes, sir.

Tr. p. 37.

* * * * * * *

The Court: And in June, 1940, when you were told that you were to be drafted into the Japanese army, between June, 1940, and March, 1941—a period of almost a year—you didn't make any effort to find out whether an American citizen—you knew you were an American citizen?

The Witness: Yes, sir.

The Court: You didn't make any effort to find out whether an American citizen was required to go into the Japanese army. And the reason that you didn't make any effort was that you heard rumors that the Kempi Tai would beat you if they found that you didn't want to go into the army; is that your testimony?

The Witness: Yes, sir. Also, this nisei friend of mine that was employed in the embassy stated the fact that dual citizen niseis, the American Consulate couldn't do anything for the citizen nisei.

Tr. p. 47.

* * * * * * *

[fol. 70] The Court: In other words, he told you that if you went to the officials of your own country, the United States—

The Witness: Yes.

The Court: —that the Japanese police would find out about it and they would beat you; right?

The Witness: Yes.

Tr. p. 49.

* * * * * * *

After argument by counsel, the Court made the following statements:

"Well, of course, the short answer to the entire argument, counsel, is that the Court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony." Tr. p. 55.

* * * * * * *

"I believe this: he went into the service because he wanted to go into the service. I believe he went to Japan, and I believe that he waited for them to call him to the service, because under the laws of Japan that's the manner in which they took their men into the service under the draft laws, the conscription laws." Tr. p. 56.

* * * * * * *

"* * * All I am saying is that he went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. He went over there to serve his hitch in the army. He went over and waited until they reached him on the draft, and when they did he was drafted. And that is what he was there for. And his service could not be considered involuntary." Tr. p. 57.

The Court entered Findings of Fact in which the Court found that plaintiff went to Japan in August, 1939 at twenty-three years of age, knowing at that time that he was likely to be called for military service in the Japanese Armed Forces; that he served in those armed forces from March, 1941 to September, 1945 while he was a national of Japan; that from the time he received his notice to report for physical examination in June, 1940 until March, 1941 when he was inducted, the plaintiff made no effort (1) to

return to the United States; (2) to avoid entry or service in [fol. 71] the Japanese Armed Forces; (3) to renounce his Japanese nationality; (4) to communicate or attempt to communicate, either with American officials in Japan, or with Japanese officials, with respect to the necessity or propriety of his entry and service in the Japanese Armed Forces. The Court further found that the service was not the result of coercion, and that it was the free and voluntary act of the plaintiff. On these Findings, he entered the Judgment from which this appeal is taken.

Appellant contends that some of the findings made by the lower court must be set aside, because (1) there is no positive evidence in the record to support them and they were expressly negatived by the plaintiff on the stand; (2) the proof of expatriation must be "clear, unequivocal and convincing"; (3) the burden of proof of the voluntary nature of the expatriating act is on the one trying to show expatriation (here, the defendant) and the burden of proof is not on the plaintiff to show involuntariness.

Counsel for both parties agree that the act of expatriation must be a voluntary act on the part of the plaintiff in order to effect an expatriation. However, there is no requirement that he knew or intended that his act would result in an expatriation. *Savorgnan v. United States*, 338 U.S. 491 (1950). The ground of expatriation relied on by the defendant in the present case is that contained in § 401(e) of the Nationality Act of 1940, 8 U.S.C.A. § 801(e), 1946 Ed. That section reads as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * (e) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state."

That section is fortified by the presumption appearing in § 402 of the same Act, 8 U.S.C.A. 802,[2] 1946 Ed., which reads in part as follows:

> "A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) or (d) of Section [fol. 72] 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * and such presumption shall exist until overcome whether or not the individual has returned to the United States. * * * "

The crucial issue in this case is whether the entry of the plaintiff into the armed forces of Japan was a voluntary act on his part. In 1940 when this statute was enacted by Congress it was well known that many countries had conscription laws. If Congress had intended to exclude the act of a dual national who entered the military service of a foreign country by means of the conscription laws from the expatriation provisions of the Act, it would have been very simple to so provide. The plaintiff contends that the burden of proof of voluntariness was on the defendant, while the defendant contends that the burden of proof was on the plaintiff to show involuntariness. The issue was expressly resolved in the case of *Pandolfo v. Acheson*, 2 Cir., 202 F. 2d 38, and the ruling there was followed by the Court of Appeals for the District of Columbia, in *Alata v. Dulles*, 221 F. 2d 52, and appears to us to be the correct rule. In *Alata v. Dulles*, *supra*, at page 54, it is said:

> "The Secretary of State answers that since the evidence supports the finding that he took the expatriating oath the burden of offsetting its effect by showing it to have been involuntary was cast upon him and he failed to carry this burden.
>
> We agree with the Secretary's position as to where the burden lay. As held in *Pandolfo v. Acheson*, 2 Cir., 202 F. 2d 38, 40,

---

[2] Sections 802 and 801(c) were repealed by the Immigration and Nationality Act of 1952 and are now covered by 8 U.S.C.A. §§ 1482 and 1481(a)(3) respectively.

> " * * The plaintiff has the burden of proving that he is a United States citizen. He made a *prima facie* case by alleging and proving his birth in New York. The Government then had the burden of showing that he had expatriated himself. This it did by proof of his oath of allegiance to the King of Italy. Presumptively this oath was voluntarily taken. He then had the burden of going forward with evidence to establish that it was taken under duress.' "

[fol. 73] This rule if applied here would cast the burden upon the plaintiff to show that his entry into the armed forces was involuntary. There is no presumption that one who is conscripted into the armed forces enters involuntarily, and all the circumstances must be looked at to resolve the question of voluntariness. *Acheson v. Maenza*, D. C. Cir., 202 F. 2d 453, 459; *Alata v. Dulles*, *supra*; see 15 A. L. R. 2d 550, and 1956 Supp. In *Alata v. Dulles*, *supra*, at page 55, the Court said:

> "We pointed out in *Acheson v. Maenza*, *supra*, that induction into an army under a conscription law is alone insufficient to establish involuntariness of service under the Nationality Act of 1940 * * *. But we also said, 'there must be consideration of the circumstances attending the service in the foreign army, and the reasonable inferences to be drawn therefrom * * * ' ".

The trier of fact need not accept the uncontradicted testimony of a witness who appears before it, and the demeanor of that witness may be such as to convince the trier that the truth lies directly opposed to the statements of the witness. *NLRB v. Howell Chevrolet Co.*, 9 Cir., 204 F. 2d 79, 86; *aff'd sub. nom. Howell Chevrolet Co. v. NLRB*, 346 U. S. 482; *Chow Sing v. Brownell*, 9 Cir., 217 F. 2d 140, 143; *Lew Wah Fook v. Brownell*, 9 Cir., 218 F. 2d 924; *Mar Gong v. Brownell*, 9 Cir., 209 F. 2d 448, 449, 450; Wigmore on Evidence, Third Ed., Vol. VII, § 2034 n. 3; *Zimmer v. Acheson*, 10 Cir., 191 F. 2d 209, 212. This rule is particularly true where the witness is interested in the outcome of the case, or where his testimony is improbable or contains patent omissions and inconsistencies. *Quock Ting v. United States*, 140 U. S. 417, 420; *Zimmer v. Acheson*, *supra*. We

think that the testimony of the plaintiff in the present case, as revealed in the record and summarized and set out above in part, clearly brings it within this rule, and entitled the Court to find that the facts were otherwise than stated by the plaintiff, and by clear and convincing proof, if need be. Under no circumstances can it be said that they are "clearly erroneous", within the meaning of Rule 52(a) of the Rules of Civil Procedure, and hence they cannot be set aside by this Court.

The Court was not required to believe that appellant was himself the victim of terror conditions in Japan. In dis- [fol. 74] cussing a similar contention in this Court in *Coumas v. Brownell*, 9 Cir., 222 F. 2d 331, 1955, Chief Judge Denman said:

> "Coumas first contends that since expatriation must be caused by his 'voluntary' act, *Perkins v. Elg*, 307 U. S. 325, 334, 50 S. Ct. 884, 83 L. Ed. 1320, his entry into the Greek army was involuntary because he was *inducted* into it. It nowhere appears that he protested his induction, and he voluntarily went to Greece presumably knowing that under the Greek law he, a Greek citizen, might be conscripted into the army. Cf. *Dos Reis ex rel. Camara v. Nicolls*, 1 Cir., 161 F. 2d 860."

This language is particularly descriptive of the facts in the instant case.

Neither the facts found by the District Court nor the inferences from those facts can be set aside by this Court unless "clearly erroneous." The record here amply supports the conclusion of the lower court that the act of the plaintiff in entering the Japanese army was a voluntary act.

Appellant further complains of the refusal of the lower court to admit in evidence the passport application of appellant. There appears to be no error in this ruling. In any event the appellant testified upon the trial to all of the important facts which appeared in the passport application.

It is further contended that the recent decision in *Gonzales v. Landon*, 350 U. S. 920, means that this case should be reversed, inasmuch as the Court there said that proof of expatriation must be by "clear and convincing" evidence, and that this was not done here. We do not agree. First,

the *Gonzales* case only dealt with §401(j) of the 1940 Act which provides that a person expatriates himself when he remains out of the country "for the purpose of avoiding service in the armed forces of the United States." This ground of expatriation, unlike the one in issue here, requires a mental element in the expatriating act itself. This is all the more clear by the fact that the cases cited by the Supreme Court for its authority dealt also with conduct requiring a certain mental element. *Baumgartner v. U. S.*, 322 U. S. 665, 1943; *Schneiderman v. U. S.*, 320 U. S. 118, 1942. Secondly, the fact that appellant here performed [fol. 75] the act that is proscribed by §401(c), to-wit, entering and serving in the armed forces of Japan, was established by clear and convincing evidence,—in fact, it was pleaded by plaintiff in his complaint and admitted in the answer.

Appellant further contends that §401(c) of the 1940 Act which is here under consideration, is unconstitutional. This Court has already held other sections of the same Act providing for expatriation to be constitutional. As to §401(j), *Vidales* v. *Brownell*, 9 Cir., 217 F.2d 136, 138; *Gonzales* v. *Landon*, 9 Cir., 215 F.2d 955, rev'd on other grounds, 350 U.S. 920; as to §401(c), *Miranda* v. *Clark*, 9 Cir., 180 F.2d 257. There is nothing in these previous holdings of this Court to indicate that the same result should not be reached as to §401(c). Moreover, the many cases from other circuits, cited above, which have considered expatriation under §401(c) have assumed that it is constitutional. Appellant asserts that all persons born in the United States are citizens by virtue of the Constitution and that Congress is powerless to enact laws which will deprive a native born American of his citizenship absent a voluntary renunciation by such person. That Congress has such power was established in *Mackenzie* v. *Hare*, 239 U.S. 299. In our view, the claim of unconstitutionality lacks merit.

The judgment of the District Court is affirmed.

[File endorsement omitted.]

[fol. 76] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14742

MITSUGI NISHIKAWA, Appellant

vs.

JOHN FOSTER DULLES, as Secretary of State, Appellee

JUDGMENT—Filed and entered June 18, 1956

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 415

[Title omitted]

ORDER ALLOWING CERTIORARI. Filed November 13, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 318 Misc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3103-9)

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IN THE

Supreme Court of the United States

October Term, 1956

No. 415

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1956

No. .....

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Mitsugi Nishikawa, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a judgment of the United States District Court for the Southern District of California.

Opinions Below.

No opinion was written by the trial court.

The opinion of the court below [R. 66-75] is not yet reported. It is set forth hereinafter as Appendix "A." The judgment of the court below [R. 76] is set forth hereinafter as Appendix "B."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is June 18, 1956 [R. 76] and the time of its entry is the same [R. 65].

2. No rehearing was requested nor was any extension of time within which to petition for certiorari requested.

3. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 1254(1).

Questions Presented for Review.

1. Should Section 401(c) of the Nationality Act of 1940 (54 Stat. 1168; 8 USC 801(c))[1] be so interpreted as to impose compulsory loss of citizenship upon a native born United States citizen under the facts of this case—namely: obedience to the compulsory military conscription laws of Japan by a United States citizen temporarily residing in that country, he also, under the laws of that country, having the nationality thereof; or should the statute, in order to avoid a grave constitutional question, be so interpreted as not to impose loss of citizenship on one who, while in a foreign country and subject to the laws thereof, obeys the laws of that country?

2. If the answer to question 1 is that 8 USC 801(c) is to be so interpreted as to impose loss of citizenship under such facts, is the statute unconstitutional, on its face and as applied in this case, under the citizenship clause

[1] Now covered by 8 USC 1254(a)(3).

of the 14th Amendment and, or under the due process clause of the 5th Amendment?

3. In expatriation cases arising under Section 401(c) of the Nationality Act of 1940, is the same standard of proof required as in denaturalization cases and as in cases arising under Section 401(j) (54 Stat. 1137, 8 USC 801(j))?

4. Upon whom is the burden of proving the nature of the conduct under Section 401(c)—the Government to show that the conduct was voluntary, or the citizen to show that the conduct was involuntary?

5. Where the military service referred to in Section 401(c) of the Nationality Act of 1940, is pursuant and in obedience to the compulsory military conscription law of the foreign country, does a rebuttable presumption arise that such service is involuntary?

6. Irrespective of where the burden of proof may lie in an expatriation case arising under Section 401(c) of the Nationality Act of 1940,—whether that burden be upon the Government to show, by clear, convincing and unambiguous evidence, that the military service was voluntary, or it be upon the Government to overcome the presumption of involuntary conduct which arose by reason of the fact that petitioner's military service was pursuant to his being drafted under the compulsory Japanese Military Service Law, or whether it be upon petitioner to show that his service was involuntary, was appellant's military service in Japan voluntary so that, constitutional and interpretation questions aside, he is to be held to have lost his United States nationality?

Constitutional Provisions and Statutes Which the Case Involves.

Section 401(c) of the Nationality Act of 1940 (54 Stat. 1168; 8 USC 801(c)):

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> ". . .
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state";

Section 1 of the 14th Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

Statement of the Case.

Petitioner was born in California on April 20, 1916 [R. 10]. He was by United States law (14th Amendment) and by Japanese law [R. 34] a citizen of both countries by birth. Until he went to Japan in August, 1939 [R. 18], petitioner lived all of his life in the United States and was educated in the schools in the United States [R. 18]. In 1939 petitioner went to Japan in

order to visit and study, intending to remain between two to five years [R. 26]. His mother and father remained in the United States [R. 29, 30]. He travelled on an American, not a Japanese, passport [R. 39-40].

When he got to Japan, petitioner started to study under a tutor in Japanese language [R. 35]; he not being able to read Japanese characters [R. 29], but when his father died in November, 1939 [R. 35], he had no funds and so had to go to work (*Ibid.*). Around June, 1940, pursuant to the Japanese compulsory military conscription law [R. 22, 23] he was required to take a physical examination [R. 18] and on March 1, 1941, pursuant to the same law, he was drafted into the army (*Ibid.*). Under the Japanese Military Service Law, service by petitioner was compulsory [R. 23] and said law provided for criminal punishment for evasion thereof (*Ibid.*).

When he received the notices to report for physical examination and to report for induction, petitioner was afraid not to comply because he heard rumors that the Kempei Tei[2] would throw persons who tried to dodge the draft into prison [R. 37], or beat them [R. 47] and he even heard of one case of a boy who was bayoneted by them and killed [R. 37].

At the time here involved, the government of Japan was tyrannical and despotic, with the military controlling

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[2]The Kempei Tei were the dreaded Japanese military police which held the people in Japan generally in fear. See *Kanno v. Acheson*, 92 F. Supp. 183, 184 (DC SD Cal. 1950); *Kato v. Acheson*, 94 F. Supp. 415, 416 (DC SD Cal. 1950).

the country. Even high officials were killed in their homes [R. 37]. The police made monthly checks of the boarding house where petitioner lived [R. 44].[3] The well known ruthlessness of the regime in power in Japan during this time is a matter of such general public history that this Court can take judicial notice thereof.[4] It was under these circumstances that petitioner obeyed the Japanese law.[5]

Petitioner was discharged from service at the end of the war [R. 19].

After the war, petitioner was denied a passport to return to the United States by the American Consulate at Yokohama on the ground that he had lost his United States citizenship by reason of his service in the Japanese Army [R. 12]. Hence this lawsuit.

The Government introduced no evidence [R. 49, 50].

The District Court had jurisdiction under Section 503 of the Nationality Act of 1940 (54 Stat. 1171; 8 USC 903).[6]

---

[3] Cf. Page 3, Murayama deposition in *Fukumoto v. Dulles*, 216 F. 2d 558, detailing the surveillance under which Nisei (first generation American-born persons of Japanese ancestry) were kept by the police.

[4] *Bank of Augusta v. Earle*, 13 Pet. (US) 519, 590, 591, 10 L. ed. 274, 304; *Sfarroco v. Strong*, 3 Wall. (US) 97, 18 L. ed. 49, 50; *Daniels v. Tearney*, 102 U.S. 415, 26 L. ed. 187, 188; *The Apollon*, 9 Wheat. (US) 362, 374, 6 L. ed. 111, 114.

[5] Cf. *Acheson v. Maenza*, 202 F. 2d 453, 459 (CA DC 1953).

[6] Now covered by 8 USC 1503 and preserved by the Savings Clause of the Immigration and Nationality Act of 1952 (Sec. 405(a) thereof [66 Stat. 280]; note to 8 USC 1101).

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

The Court of Appeals' Decision Is in Conflict With Decisions of Other Courts of Appeal on the Same Matter:

A.

On the Issue as to Whether Military Service by Reason of Conscription Raises a Rebuttable Presumption and Is Sufficient to Establish Prima Facie That the Service Was Involuntary.

The court below held the law to be that [R. 8]:

> "There is no presumption that one who is conscripted into the armed forces enters involuntarily . . ."

This is in direct conflict with the decisions of the Third Circuit.

In *Lehmann v. Acheson*, 206 F. 2d 592, 594 (CA 3 1953), the court said:

> "Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish *prima facie* that his entry and service were involuntary . . ."

That court ruled the same way in *Perri v. Dulles*, 206 F. 2d 586, 589 (CA 3 1953).

And on facts and a record indistinguishable from that here, except that here the facts are stronger from the standpoint of petitioner because the events took place in tyrannical, militaristic, despotic Japan, while in *Lehmann* they took place in democratic Switzerland, the Third Circuit held (206 F. 2d at 594):

> "Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in the Swiss Army as a result of his conscription were involuntary."

The decision below is likewise contrary to that of the Second Circuit in *Augello v. Dulles*, 220 F. 2d 344, 347 (CA 2 1955) where the court held that:

> "the fact of the plaintiff's conscription into the Italian army was sufficient proof of duress to preclude a finding that his consequent taking of the oath was voluntary."

B.

On the Issue as to Whether the Burden Is Upon the Government to Prove That the Military Service Was Voluntary.

The court below held [R. 73] that:

> "the burden (is cast) upon the plaintiff to show that his entry into the armed forces was involuntary."

In so doing, the court below, while acknowledging [R. 71] "that the act of expatriation must be a voluntary act on the part of the plaintiff in order to effect an expatriation," and while approving language in *Pandolfo v. Acheson* (CA 2 1953), 202 F. 2d 38, 40 that "the Government . . . had the burden of showing that he had expatriated himself," disregarded the fact that the voluntary aspect of the case is just as much a part of the Government's case as any other, for "the very essence of expatriation is that it be voluntary." (*Dorcau v.*

Marshall, 170 F. 2d 721, 723 (CA 3 1948).[3] If there can be no expatriation *unless* the act is voluntary, and if the Government has the burden of proving expatriation, the Government must perforce, prove that the act is voluntary, and by the same heavy quantum of proof as any other element, for without such proof, there is no expatriation.

In failing to apply this principle, the decision below is in conflict with decisions of the Second, Third and Seventh Circuits.

In *Lehmann v. Acheson*, 206 F. 2d 592, 598 (CA 3 1953), the court said:

> "It was the District Court's view that Lehmann bore the burden of establishing that his service in the Swiss Army and his taking of an oath of allegiance to Switzerland were involuntary. In that respect the District Court erred. . . ."

Accord:

Angello v. Dulles, 220 F. 2d 344, 345 (CA 3 1955);

Stipa v. Dulles, 233 F. 2d 551, 556 (CA 3 1956);

Schioler v. Secretary of State, 175 F. 2d 402, 403 (CA 7 1949).

[3] As will be seen *infra*, pg. 23, this Court has held to the same effect in *Perkins v. Elg*, 307 U. S. 325, 334: "expatriation is the *voluntary* renunciation or abandonment of nationality and allegiance." (Italics added.)

C.

The Decision Below Is Contrary to the Decisions, Including the Very Ones Upon Which the Court Below Relied, of Other Circuits Which, on Substantially the Same Facts, Have Held the Military Service to Be Not Voluntary and Hence Not Expatriating.

The decisions of the Second and Third Circuits in *Lehmann*, *Perri*, *Stipa* and *Augello* have already been mentioned.

The court below relied upon three cases [R. 72, 73] two from the District of Columbia (*Alata v. Dulles*, 221 F. 2d 52 and *Acheson v. Maenza*, 202 F. 2d 453) and one from the Second Circuit (*Pandolfo v. Acheson*, 202 F. 2d 38).

In the first place, it is at once seen that all three cases held for the citizen and against the Government. This fact is especially persuasive as to the *Alata* case, where the Court of Appeals reversed the trial court in the face of a finding of voluntary conduct. The facts in all three are essentially the same as in the instant case. In other words, had the case at bar arisen in the Second Circuit or in the District of Columbia, it seems certain that the decision would be contrary to that of the court below.

Secondly, as to the *Pandolfo* case from the Second Circuit, it is manifest from a reading of the later *Augello* case, that that circuit did not interpret its earlier *Pandolfo* case as did the court below interpret it. Thus after citing (220 F. 2d at 345) the *Pandolfo* case for the proposition that "on the issue of expatriation the burden of proof was on the defendant," the court reversed the judgment, based, as here, on a finding of voluntary con-

duct, with a direction to grant the declaration sought, because (220 F. 2d at 347):

> "on the issue of duress the fact of the plaintiff's conscription was disregarded. And since there was no evidence to rebut the inference of duress flowing from the plaintiff's status as a conscript there is no need to remand for further findings."

Thus it is clear, not only from the above analysis, but also from the heavy reliance the court in the *Angelio* case placed (220 F. 2d at 346) upon the Third Circuit's decisions in *Perri* and *Lehmann*, that the Second Circuit's view of the law in this type of case is the same as that of the Third Circuit, and, consequently, in conflict with that of the decision below.

Other cases from the Second Circuit demonstrating the conflict between the decision below and those of that Circuit are *Monaco v. Dulles*, 210 F. 2d 760 (CA 2 1954) and *Podea v. Acheson*, 179 F. 2d 306 (CA 2 1950).

As to the two cases from the District of Columbia (*Alata* and *Macuza*) upon which the court below relied, in addition to their being substantially the same, factually, as the case at bar, and hence in conflict with the decision below, a consideration of later District of Columbia cases demonstrates that the concept as to when that court will permit compulsory imposition of loss of citizenship in a case of this type is entirely at odds with the court below. A reading of these cases demonstrates that the District of Columbia is now in accord with the Third Circuit as to the effect of conscription and that that court also considers the Second Circuit to be likewise in line. Thus, in *Soccodato v. Dulles*, 226 F. 2d 243, 246, 247 (CA DC

1955), the court, in discussing and agreeing with the Second Circuit's *Angello* case said:

> "... The appellate court held that the presumption of voluntariness may be rebutted by proof that the oath was taken as an incident of compulsory military service, citing Perri v. Dulles, *supra*, as well as Mandoli v. Acheson, *supra*."

And then, further demonstrating the conflict between the District of Columbia and the decision below, the court said (footnotes omitted):

> "Whether stated in terms of resolving factual doubts in favor of citizenship, as in Alata v. Dulles, or in terms of the necessity of proving expatriation by clear, unequivocal and convincing evidence, as in Monaco v. Dulles, we must keep these criteria in mind when reviewing findings of a trial judge in expatriation cases. . . . Guided by the criteria referred to, considered with this interpretation of 'clearly erroneous,' we . . . are impelled to set aside the conclusion reached by the learned trial judge, *the more so because of uncertainty that the criteria set forth were known to apply in this jurisdiction when the case was before him.*" (Italics added.)

In accord from the District of Columbia are these further cases, all reversing trial courts which had ruled that the conduct was voluntary:

DeMarco v. Dulles, 226 F. 2d 265 (CA DC 1955);

Becce v. Dulles, 226 F. 2d 265 (CA DC 1955) (two cases);

Santi v. Dulles, 226 F. 2d 266 (CA DC 1955).

Contrary to the District of Columbia's holding that it would not adopt "a Spartan standard by which to deter-

mine whether the appellant acted voluntarily." (*Mandel-sohn v. Dulles*, 207 F. 2d 37, 39 (CA DC 1953), and that "the law does not exact a crown of martyrdom as a condition of retaining citizenship." (*Acheson v. Maenza*, 202 F. 2d 453, 459), the court below did adopt such a standard and did exact such a crown.

It is appropriate at this point to call attention to 41 Opinions of the Attorney General No. 16.[8] In that opinion the Attorney General enunciated principles clearly inconsistent with the position of the Government in the instant case.

D.

As to Whether It Can Be Held That Compulsory Military Service Due to Conscription Is Voluntary, Premised Upon Acts of Omission Rather Than Commission.

It is clear that the court below [R. 78], agreed with the trial court that it was proper to hold petitioner's military service to have been voluntary based not on what he *did* do, but on what he *did not* do.[9]

In so doing, the decision below is in conflict with those of the Second, Third and the District of Columbia Circuits.

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[8] Approved by this Court in *Mandel v. Acheson*, 344 U.S. 133, 138 and commented upon by the Third Court in the *Lehman* case, 206 F. 2d at 500.

[9] He: did not go to the American Consulate and tell them that he did not want to serve in the Japanese Army [R. 68]; did not tell any Japanese official that he was an American citizen [R. 68] (there is no showing in the record that the Japanese officials did not know this fact; it is to be assumed they did); did not make an effort to renounce his Japanese nationality [R. 68] (there is nothing in the record to show that there was any provision in Japanese law permitting such a thing or that, if there was, petitioner knew about it); did not protest against induction in the army or the taking of the physical examination [R. 68].

In *Lehmann v. Acheson*, 206 F. 2d 502, 506, the Third Circuit said:

> "An analysis of the District Court's opinion discloses that its determination was premised on acts of omission, rather than commission, on the part of Lehmann with respect to his service in the Swiss Army and attending circumstances.
>
> . . . . . .
>
> "With respect to these 'omissions' it need only be said that they were utterly irrelevant to the critical issue of 'voluntariness'."

More glaring is the conflict of the decision below with other circuits when compared with the Second Circuit's decision in *Monaco v. Dulles*, 210 F. 2d 760 (CA 2 1954), where the plaintiff not only committed "sins of omission" but actually "ignored the warning of the State Department, made in response to Italian laws of dual nationality, to secure permission to enter Italy without liability for military service." (210 F. 2d at 761.)

And see *Pandolfo v. Acheson*, 202 F. 2d 38 (CA 2 1953), where the Second Circuit, on the authority of this Court's decision in *Mandoli v. Acheson*, 344 U.S. 133, rejected the argument, inherent in the decision below, that the failure of the plaintiff to remove himself from the jurisdiction of the Italian authorities rendered his conduct voluntary.

To the same effect, rejecting the argument that failure to get out of the military service renders the conduct voluntary, is the District of Columbia Court's decision in *Soccodato v. Dulles*, 220 F. 2d 243, 245 (CA DC 1955), relying, incidentally, upon the Third Circuit's opinion in *Perri v. Dulles*, 206 F. 2d 580, 589.

E.

As to Whether the Statute Should Be Construed so as to Make Expatriating Conduct Which Is in Obedience to the Laws of a Foreign Country by One Present in That Country.

By refusing to construe 8 USC 801(c) so as not to apply to the facts of this case, the court below is again in conflict with the Third Circuit's decision in *Lehmann v. Acheson*, 206 F. 2d 502 (CA 3 1953), where that court after quoting from this court's decision in *Kawakita v. United States*, 343 U. S. 717, 723, 725, said (206 F. 2d at 508):

> "Lehmann's actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which would possibly justify a finding that Lehmann did aught but what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland . . ."

F.

As to Whether 8 USC 801(c) Is Unconstitutional.

The court below sustained the constitutionality of the section in one paragraph [R. 75], citing three of its own cases[10] and this Court's decision in *Mackenzie v. Hare*, 239 U. S. 299.[11] The court's statement that "the many cases from other circuits, cited above, which have considered expatriation under §401(c) have assumed that it is con-

[10] In none of which was the issue discussed or reasoned, but simply disposed of by single sentence statements.

[11] The inappositeness of this decision will be discussed below.

stitutional," is a *non sequitur*. In the cases to which the court had reference (*Pandolfo, Alata, Miaonza*) there was no occasion for those courts to consider the question of constitutionality for they all held in favor of the citizen on other grounds.

The decision of the court below sustaining the constitutionality of the section is in conflict with the reasoning of the First Circuit in *Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 860, 862, 863 (CCA 1 1947), where the court, by dictum to be sure, said:

> "It is by no means clear that Congress would have the power to deprive a native born American citizen of his nationality under the circumstances here presented."

After which it explained its reasons for that opinion.[12]

G.

As to Whether the Finding by the Trial Court, Approved by the Court Below, That Petitioner's Military Service Was Voluntary, Is Clearly Erroneous Within the Meaning of Rule 52(a), Federal Rules of Civil Procedure.

What the court meant by its statement [R. 73] that the trial court was entitled "to find the facts were otherwise than stated by the plaintiff" is not clear. The only substantial finding of fact which is contrary to what plaintiff testified is the ultimate finding [VIII, R. 12] that "plaintiff's entry and service in the Japanese Armed

[12] The First Circuit avoided deciding the constitutional issue, in accordance with the well known rule, by holding, what is now the accepted law, that the conduct must be voluntary and that such was not the fact in that case, hence there was no loss of citizenship

Forces was his free and voluntary act."[18] As to the other findings referred to by the court [R. 5, 6] (save Finding III; as to which see footnote 16) these were all in accordance with plaintiff's testimony, which the trial court believed, and which, improperly as we have seen above under Point I, D, it used to sustain its ultimate finding of voluntary conduct.

Not only is the ruling of the court below on this ultimate finding in conflict with the Third Circuit's decision in *Stipa v. Dulles*, 233 F. 2d 351, 353 (CA 3 1956), which held that such a finding is but an inference from other facts and "as such is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule applicable to ordinary findings of fact by the trial court," but it is also in conflict with the decision of the District of Columbia in *Soccodato v. Dulles*, 226 F. 2d 243, 247 (CA DC 1955), where on substantially the same facts that court held the finding to be clearly erroneous within the meaning of Rule 52(a).

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[18]Finding VII, R. 12, is the same finding, only stated negatively. The only other finding contrary to the record is the irrelevant one [R. 25, Finding No. III (*See Mañiago v. Dulles*, 210 F. 2d 760, 761 (CA 2 1954))], that when plaintiff went to Japan in 1939 he knew he was likely to be called for military service in the Japanese Armed Forces. Though not articulated, this finding, by the trial court, apparently approved by the court below [R. 70], assumes, with absolutely no evidence to support the assumption, that unlike other Americans, an American boy of Japanese parents, who visits the country where his parents were born, does so "to do his duty as a Japanese national." [R. 55.] This assumption is subject to the same infirmity as the presumption in the California Alien Land Law struck down by this Court in *Oyama v. California*, 332 U.S. 633.

Moreover, the ruling of the court below that the trial court had the right to supply evidence, which was not presented, contrary to that which was presented, apparently on the theory that the trial court did not believe the plaintiff [R. 70; R. 55][14] (although as to what facts the court did not believe is not clear), is contrary to that of the Third Circuit in *U.S. ex rel. Schachter v. Curran*, 4 F. 2d 356, 358 (CCA 3 1925), where the court approved Judge Hand's statement that:

> "It is not enough for the Board of Special Inquiry to say that they do not believe. . . . They have no power to dispense with the usual means of ascertaining the truth."

The statement of the court below [R. 73] that the trial court's supplying of the fact (that the military service was voluntary) was "by clear and convincing proof, if need be," is without support. The trial court's finding on this ultimate fact was based entirely upon the erroneous theory of "omissions," as discussed above. (The Government presented *no* evidence, but rested immediately at the conclusion of plaintiff's case [R. 49, 50].) Such can scarcely be said to arise to the level of the clear, convincing, unambiguous *proof* required of the Government in cases such as this.

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[14] Cf. as to this phase, the similarity of this case with *Gonzales v. Landon*, 350 U.S. 920 [R. 33 in that case]: "I don't know how such foolish statements can be made."

II.

The Decision of the Court Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Decided by This Court.

At least thrice within the last few years has this Court considered cases involving the constitutionality of subsections of Section 401 of the Nationality Act of 1940. Two of the cases (*Acheson v. Okimura*, 342 U.S. 806, and *Acheson v. Murata*, 342 U.S. 900) involved the very subsection, (c), involved in this case.[18] The third (*Gonzales v. Landon*, 350 U.S. 920) involved subsection (j). In all three cases this court did not decide the constitutional question.

The *Okimura* and *Murata* cases were direct appeals (under 28 USC 1252) by the Government from decisions of the District Court for the District of Hawaii holding subsections (c) and (e) unconstitutional (*Okimura v. Acheson*, 99 F. Supp. 587; *Murata v. Acheson*, 99 F. Supp. 591). This Court,[19] without deciding the constitutional question (which was the very basis for the appeals) remanded the cases for findings as to the circumstances attending appellees' service in the Japanese Army (and

[18]Murata also involved subsection (e).

[19]Mr. Justice Black being of the opinion that the judgments should be affirmed and Mr. Justice Douglas being of the view that the findings were adequate to show that the conduct was under compulsion.

voting in Japanese elections) and the reasonable inferences to be drawn therefrom.[17]

In the *Gonzales* case, this court reversed the court below because of the failure of the Government to meet the standard of proof required of it in such cases, and again did not reach the constitutional questions.

We submit that the same impelling reasons which induced the court to grant certiorari in the *Gonzales* case and to consider the appeals in the *Okimura* and *Murata* cases are present here and that the importance of the question calls for decision by this Court. This is true not only as to the constitutional question, but also as to the problem of the correct interpretation to be given the statute.

Moreover, the question is important not only from the standpoint of subsection (c) alone but because the idea of compulsory loss of citizenship, for the doing of this or that act, looms large in our national thinking and conscience. Although Congress passed R. S. 1999 in 1868 (15 Stat. 223; now covered by 8 USC 1482 and 1483) recognizing the *right* of a citizen who so desired to expatriate himself, since that time Congress has passed

[17] On remand the trial court made the required findings, but still adhered to its view that the sections were unconstitutional (111 F. Supp. 303, 111 F. Supp. 306). It held to the same effect in six later cases: *Terada v. Dulles*, 121 F. Supp. 6; *Uesu v. Dulles*, No. 1251; *Kikkawa v. Dulles*, No. 1250; *Hisamoto v. Dulles*, No. 1318; *Tamaya v. Dulles*, [illegible]3 and *Igarashi v. Dulles*, No. 1240 (the latter holding Sec. 401(d) also invalid). The Government prosecuted appeals in none of these cases.

more and more legislation setting forth ever increasing instances for "compulsory expatriation"[18] whether the native-born citizen desires the same or not. (See "The Expatriation Act of 1954," 64 Yale L. Jl. 1164, 1171 *et seq.* 8 USC 1481, 1482.) The instant case, therefore, represents the plight of not merely one person, nor even the many more who were caught under like circumstances,[19] but the case represents a problem which may and has touched the lives of thousands of American born citizens. The importance of the question merits hearing by this Court.

Furthermore, the constitutional questions presented are of the recurring serious type which call for the grant of certiorari by this Court. (*Wieman v. Updegraff*, 344 U.S. 183, 186.)[20]

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[18]This contradictory phraseology is that of the Government's in its brief (pg. 49) before this Court in the *Gonzales* case, No. 121, Oct. Term, 1955.

[19]See *Kato v. Acheson*, 94 F. Supp. 415, 416 (DC SD Cal 1950).

[20]The court below has recently upheld the constitutionality of 8 USC 801(j). (*Perez v. Brownell*, 7 12 1956 No. 14,497, F. 2d . . 25 L. W. 2057.) Petition for writ of certiorari is being prepared in that case. Pending before that court is *Mendoza-Martinez v. Mackey and Brownell*, No. 14997, also involving the constitutionality of 8 USC 801(j). Counsel in that case filed a brief *amicus curiae* in this Court in *Gonzales v. Landon*. Pending before the Court of Appeals for the Second Circuit is *Trop v. Dulles*, No. . . . involving the constitutionality of 8 USC 801(g). (At the time of the writing of this petition no number had yet been assigned the *Trop* case.)

III.

The Court Below Has Decided Questions of Federal Law in Conflict With Applicable Decisions of This Court.

A.

The Decision Below Is in Conflict With This Court's Decision in Gonzales v. Landon, 350 U.S. 920, in Holding That the Standard of Proof Required in Cases Arising Under Section 401(c) of the Nationality Act of 1940 Is Different From That Required Under 401(j) and in the Denaturalization Cases.

The court below held [R. 74] first that there is a different standard of proof required under section 401(c) than under 401(j) and that therefore this Court's decision in *Gonzales v. Landon*, 350 U.S. 920, is not controlling. We submit there is no basis for the distinction. The court below has confused the element of intent with the element of voluntary conduct.

There was no question in the *Gonzales* case but that petitioner there did the act interdicted by 401(j)—remained outside the United States during time of war for the purpose of evading or avoiding military service [see R. 17-18, 20 in the *Gonzales* case]. But, on the factual issue, *Gonzales* successfully argued to this Court that on the issue of voluntariness the Government had not met the burden of proof required of it (see Petitioner's Opening Brief in *Gonzales*, pp. 26, 30-31). In this argument, as seen, this Court sustained petitioner.

In refusing, therefore, to follow the *Gonzales* case the court below decided a question of Federal law in conflict therewith.

The second reason given by the court below for not following this court's decision in *Gonzales* is that [R. 75]

by alleging in his complaint that he entered and served in the armed forces of Japan, petitioner has supplied the clear and convincing evidence required by the *Gonzales* case.

The error of this reasoning is at once apparent. It completely forgets that mere service in the armed forces of a foreign state is *not* expatriating.[21] That service *must* be voluntary. "Expatriation is the *voluntary* renunciation or abandonment of nationality or allegiance." *(Perkins v. Elg*, 307 U.S. 325, 334.) (Italics added.) See also, *Mandoli v. Acheson*, 344 U.S. 133, 135. Accordingly, absent proof of the very high degree required, and refusing to require it, the decision of the court below is in conflict with this Court's decision in *Gonzales*.

B.

The Decision Below Is in Conflict With Decisions of This Court Which Have Held That Conduct Under Compulsion of Law Is Not Voluntary.

As pointed out above when discussing the conflicting courts of appeals cases, the court below ruled [R. 73] that "there is no presumption that one who is conscripted into the armed forces enters involuntarily."

This view is in conflict with at least one decision of this Court and with the purport of others.

In *Mandoli v. Acheson*, 344 U.S. 133, 135, this Court accepted the Government's confession of error that "service in the Italian army by one similarly situated could only be regarded as having been taken under legal compulsion amounting to duress." . . . ."

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[21] *Dos Reis ex rel. Camara v. Nicholls*, 161 F. 2d 849 (CCA 1 1947).

The acceptance by this Court of the confession of error, particularly in the light of the dissenting opinion, is of the utmost significance and must be taken as establishing the rule of law.[22] See *Lehmann v. Acheson*, 206 F. 2d 302, 308, 306, and *Isserlis v. Dulles*, 220 F. 2d 343, 346, 347, where the Second and Third Circuits so interpreted *Mandoli*.

In *Adams v. Maryland*, 347 U.S. 179, 181, in discussing the question as to whether one who testifies before a Senate investigating committee pursuant to subpoena, does so voluntarily, this Court said:

> "... He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail."

See also *Oklahoma Packing Co. v. Holland*, 315 U.S. 357, 363, where this Court comments on the coercive nature of a subpoena. And compare *Kawakita v. United States*, 343 U.S. 717, 728, where this Court recognized the vast difference between one who is drafted and one who volunteers.

In *United States v. DiRe*, 332 U.S. 581, 594, this Court refused to penalize "failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law." While that case is concerned with the question of probable cause to make an arrest, the refusal of this Court to infer probable cause from failure to resist authority, was a recog-

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[22] *Gibson v. United States*, 329 U.S. 338, 344, n. 9; *Young v. United States*, 315 U.S. 257, 258-259; *Hyde v. United States*, 315 U.S. 787 [refusal to accept the confession of error. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 Ed.) p. 166.]

nition by this Court as in its later cases, above cited, that submission to the force of law is not tantamount to voluntary action, but is under compulsion. . . .

C.

The Decision Below Is in Conflict With Decisions of This Court Which Held That Conduct Pursuant to Law by a United States Citizen in a Foreign Country of Which He Is Also a Citizen Should Not Be Held to Be Expatriating.

In *Kawakita v. United States*, 343 U.S. 717, 723, 725, this Court said:

> ". . . He (Kawakita) had a dual nationality, a status long recognized in the law . . . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other . . .
>
> "As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other . . . ."

This statement by the court in *Kawakita* takes on double importance when viewed in the light of the Government's argument to this Court where, with the shoe on the other foot, the Government (successfully, we might add) resisted a claim in a treason case that the petitioner had expatriated himself. In its Brief in Opposition in the *Kawakita* case, the Government said (pp. 11-12):

> ". . . the country of residence can force such a national to serve in its armed forces . . . . *Petitioner was unequivocally excused for conduct required of him by the laws of Japan.*" (Italics added.)

See also *Mandoli v. Acheson*, 344 U.S. 133, 138, holding that the law does not "require a citizen by nativity to elect between dual citizenship." Accord: *Yasui v. United States*, 320 U.S. 115, 117.

D.

If Section 401(c) Is Not Construed so as to Preclude Loss of Citizenship Under the Circumstances of This Case, It Is Unconstitutional in Violation of the Due Process Clause of the 5th Amendment and the Citizenship Clause of the 14th Amendment.

We do not make an extensive argument on this point here. The matter was briefed before this Court only last term in *Gonzales v. Landon*, 350 U.S. 920; No. 111, Oct. Term, 1955.

It will suffice at this point to say that the question is a grave and substantial one, calling for determination by this Court. We believe that the decision of the court below holding the section constitutional is contrary to the decision of this Court in *United States v. Wong Kim Ark*, 169 U.S. 649, 703,[24] to the decision of this Court in *Osborn v. Bank of the United States*, 9 Wheat. (U.S.) 738, 824,[25] and to the real meaning of this Court in *Mackenzie v. Hare*, 239 U.S. 299, 311.[26] We think the actual holding of the *Mackenzie* case is distinguishable and that if not, the case should be re-examined by this Court.

[24] "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

[25] "the constitution does not authorize congress to enlarge or abridge those rights of a native citizen."

[26] "a change in citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen."

IV.

The Decision of the Court Below Is Clearly Erroneous.

Gonzales v. Landon, 350 U.S. 920, demonstrates that where citizenship (certainly a basic Federal right) is involved, this Court will examine the facts to assure that there has not been an improper loss thereof. (Cf. *Baumgartner v. United States*, 322 U.S. 665; *Schneiderman v. United States*, 320 U.S. 118; *Oyama v. California*, 332 U.S. 633, 636; *Cassell v. Texas*, 339 U.S. 282, 283; *Niemetko v. Maryland*, 340 U.S. 268, 271.)

We suggest that the decision of the court below sanctioning the deprivation of citizenship based upon submission to law carrying penal sanctions and positing a finding of voluntary conduct on the "sins of omission" theory has resulted in a miscarriage of justice and hearing by this court should be granted to ascertain whether such a decision should be permitted to stand. Cf. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 Harv. L. R. 5, 13.

Conclusion.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

A. L. Wirin,

Fred Okrand,

Attorneys for Petitioner.

APPENDIX A.

United States Court of Appeals for the Ninth Circuit.

Mitsugi Nishikawa, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. No. 14,742. June 18, 1956.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: CHAMBERS, Circuit Judge, and SOLOMON and HAMLIN, District Judges.

HAMLIN, District Judge:

This is an appeal from a judgment of the District Court decreeing that the appellant Nishikawa, who was born in the United States, lost his United States citizenship by entering and serving in the Armed Forces of Japan from March 1, 1941 to September 6, 1945, and denying appellant's prayer for judgment that he is a national of the United States.

The action was begun when Nishikawa filed a complaint for a judgment declaring that he was a national of the United States under §503 of the Nationality Act of 1940, 8 U.S.C.A. §903, 1946 Ed.[1] The complaint alleged that he was born in the United States on April 20, 1916 and that on August 15, 1939 he went to Japan for the purpose of education and experience in the engineering field and that his intention was to return to the United States. The complaint further alleged that on or about March 1, 1941, plaintiff was conscripted into the Japanese army and served in that army until August, 1945, and that his service in said army was due to the Japanese conscription

[1]This section was repealed by the Immigration and Nationality Act of 1952, and is now covered by 8 U.S.C.A. §1503.

law and was the result of coercion and was not the plaintiff's free and voluntary act. The defendant answered and admitted that the plaintiff had served in the Japanese army during the above dates at a time when the plaintiff was a national of Japan and denied that such service was not a free and voluntary act of the plaintiff, denied that it was the result of coercion and denied that it was due to the Japanese conscription law. The answer specifically alleged that such service was the free and voluntary act of the plaintiff.

On the trial of the matter the plaintiff was called as the first and only witness. He testified in substance as follows: Until he went to Japan in 1939 he had resided and gone to school in the United States, graduating from the University of California with a degree in engineering. His parents then resided in the United States and his father had registered him at the family register in Japan when he was born. He stated he intended to stay two to five years in Japan to visit and to study. When he went to Japan he knew that Japan was fighting in Manchuria. In Japan he started to study under a tutor in Japanese language. His father died in November 1939 and funds were not available and he found a job in an aircraft plant in Osaka. About June of 1940 he received a notice to report for his physical examination pursuant to army service and he was inducted into the Japanese army in March 1941. Between those dates he did not contact or attempt to contact any American or Japanese official, nor did he at any time protest his induction. At no time did he tell any Japanese or American official that he was a United States citizen. He had heard rumors that the Kempi Tai (Secret Police) beat up persons who attempted to avoid conscription, and a friend of his who worked

at the American embassy told him that the consulate could do nothing for dual nationals, such as he was. When asked if he believed the rumors about the Kempei Tai, he stated:

> "Well, at that time the Japanese government, Japanese army was coming into control of the Japanese government and even the high officials were killed in their homes. So I had no alternative. *But it might have been true.*" [Emphasis added.]

He testified that he knew nothing about the conscription of men in the army in the United States in September, 1940, or of conditions in the United States, and that he was not told of these matters in letters from home and they were not discussed among his United States citizen friends in Japan.

He testified, in part, as follows:

> Q. Now, you stated, did you not, Mr. Nishikawa, that in 1940 you received a notice to report for physical examination, is that correct?
>
> A. Yes, sir.
>
> * * *
>
> Q. Do you recall the approximate date?
>
> A. It was around June, 1940.
>
> Q. June of 1940. And you entered the Japanese army in March of 1941, is that correct?
>
> A. Yes, sir.
>
> Q. Now, between June of 1940 and March of 1941, did you go to the American Consulate and tell them that you did not want to serve in the Japanese army?
>
> * * *

The Witness: No, sir, because I talked to friends of mine and they mentioned the fact that the American Consulate couldn't do anything for dual citizenship of Japanese while in Japan.

Q. (By Mr. Dooley:) Between June of 1940, and March of 1941, did you tell any Japanese official that you were an American citizen?

* * *

The Witness: No, sir.

Q. (By Mr. Dooley:) Between June of 1940 and March of 1941, did you make any effort to renounce your Japanese nationality?

* * *

The Witness: No, sir.

* * *

Q. Did you read the newspapers between September 10th, 1940, and March of 1941?

A. No, sir.

Q. You didn't read any newspapers?

A. No, sir.

Q. Now, how far did you go in school before you went to Japan in 1939, Mr. Nishikawa?

A. I graduated from the University of California at Berkeley, sir.

Q. And you took up engineering, did you not?

A. Yes, sir.

* * *

Q. Now, when you received your notice to report to the Japanese army did you protest in any way your entrance in the Japanese army?

* * *

The Witness: No, I didn't.

Tr. pp. 26-30

* * *

Q. (By Mr. Manes): Now, you indicated under cross-examination, Mr. Nishikawa, that you did not protest against your induction into the army—

A. Yes.

Q. —and that you did not protest against the taking of a physical examination?

A. Yes, sir.

Tr. p. 37.

* * *

The Court: And in June, 1940, when you were told that you were to be drafted into the Japanese army, between June, 1940, and March, 1941—a period of almost a year—you didn't make any effort to find out whether an American citizen—you knew you were an American citizen?

The Witness: Yes, sir.

The Court: You didn't make any effort to find out whether an American citizen was required to go into the Japanese army. And the reason that you didn't make any effort was that you heard rumors that the Kempi Tai would beat you if they found that you didn't want to go into the army; is that your testimony?

The Witness: Yes, sir. Also, this nisei friend of mine that was employed in the embassy stated the fact that dual citizen niseis, the American Consulate couldn't do anything for the citizen nisei.

Tr. p. 47.

* * *

The Court: In other words, he told you that if you went to the officials of your own country, the United States—

The Witness: Yes.

The Court: —that the Japanese police would find out about it and they would beat you; right?

The Witness: Yes.

Tr. p. 49.

* * *

After argument by counsel, the Court made the following statement:

"Well, of course, the short answer to the entire argument, counsel, is that the Court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony." Tr. p. 55.

* * *

"I believe this: he went into the service because he wanted to go into the service. I believe he went to Japan, and I believe that he waited for them to call him to the service, because under the laws of Japan that's the manner in which they took their men into the service under the draft laws, the conscription laws." Tr. p. 56.

* * *

"* * * All I am saying is that he went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. He went over there to serve his hitch in the army. He went over and waited until they reached him on the draft, and when they did he was drafted. And that is what he was there for. And his service could not be considered involuntary." Tr. p. 57.

The Court entered Findings of Fact in which the Court found that plaintiff went to Japan in August, 1939 at

twenty-three years of age, knowing at that time that he was likely to be called for military service in the Japanese Armed Forces; that he served in those armed forces from March, 1941 to September, 1945 while he was a national of Japan; that from the time he received his notice to report for physical examination in June, 1940 until March, 1941 when he was inducted, the plaintiff made no effort (1) to return to the United States; (2) to avoid entry or service in the Japanese Armed Forces; (3) to renounce his Japanese nationality; (4) to communicate or attempt to communicate, either with American officials in Japan, or with Japanese officials, with respect to the necessity or propriety of his entry and service in the Japanese Armed Forces. The Court further found that the service was not the result of coercion, and that it was the free and voluntary act of the plaintiff. On these Findings, he entered the Judgment from which this appeal is taken.

Appellant contends that some of the findings made by the lower court must be set aside, because (1) there is no positive evidence in the record to support them and they were expressly negatived by the plaintiff on the stand; (2) the proof of expatriation must be "clear, unequivocal and convincing"; and (3) the burden of proof of the voluntary nature of the expatriating act is on the one trying to show expatriation (here, the defendant) and the burden of proof is not on the plaintiff to show involuntariness.

Counsel for both parties agree that the act of expatriation must be a voluntary act on the part of the plaintiff in order to effect an expatriation. However, there is no requirement that he knew or intended that his act would result in an expatriation. Savorgnan v. United States, 338 U. S. 491 (1950). The ground of expatriation re-

lied on by the defendant in the present case is that contained in §401(c) of the Nationality Act of 1940, 8 U.S.C.A. §801(c), 1946 Ed. That section reads as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state."

That section is fortified by the presumption appearing in §402 of the same Act, 8 U.S.C.A. §802, 1946 Ed., which reads in part as follows:

> "A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * and such presumption shall exist until overcome whether or not the individual has returned to the United States. * * *"

The crucial issue in this case is whether the entry of the plaintiff into the armed forces of Japan was a voluntary act on his part. In 1940 when this statute was enacted by Congress it was well known that many countries had

[3]Sections 802 and 801(c) were repealed by the Immigration and Nationality Act of 1952 and are now covered by 8 U.S.C.A. §§1482 and 1481(a)(3) respectively.

conscription laws. If Congress had intended to exclude the act of a dual national who entered the military service of a foreign country by means of the conscription laws from the expatriation provisions of the Act, it would have been very simple to so provide. The plaintiff contends that the burden of proof of voluntariness was on the defendant, while the defendant contends that the burden of proof was on the plaintiff to show involuntariness. The issue was expressly resolved in the case of Pandolfo v. Acheson, 2 Cir., 202 F. 2d 38, and the ruling there was followed by the Court of Appeals for the District of Columbia in Alata v. Dulles, 221 F. 2d 52, and appears to us to be the correct rule. In Alata v. Dulles, *supra*, at page 54, it is said:

> "The Secretary of State answers that since the evidence supports the finding that he took the expatriating oath the burden of offsetting its effect by showing it to have been involuntary was cast upon him and he failed to carry this burden.
>
> We agree with the Secretary's position as to where the burden lay. As held in *Pandolfo v. Acheson*, 2 Cir., 202 F. 2d 38, 40.
>
> "* * * The plaintiff has the burden of proving that he is a United States citizen. He made a *prima facie* case by alleging and proving his birth in New York. The Government then had the burden of showing that he had expatriated himself. This it did by proof of his oath of allegiance to the King of Italy. Presumptively this oath was voluntarily taken. He then had the burden of going forward with evidence to establish that it was taken under duress.'"

This rule if applied here would cast the burden upon the plaintiff to show that his entry into the armed forces was involuntary. There is no presumption that one who is conscripted into the armed forces enters involuntarily, and all the circumstances must be looked at to resolve the question of involuntariness. Acheson v. Maenza, D. C. Cir., 202 F. 2d 453, 459; Mata v. Dulles, *supra*, see 15 A. L. R. 2d 550 and 1956 Supp. In Mata v. Dulles, *supra*, at page 55, the Court said:

> "We pointed out in *Acheson v. Maenza, supra*, that induction into an army under a conscription law is alone insufficient to establish involuntariness of service under the Nationality Act of 1940 * * *. But we also said, 'there must be consideration of the circumstances attending the service in the foreign army, and the reasonable inferences to be drawn therefrom. * * *.'"

The trier of fact need not accept the uncontradicted testimony of a witness who appears before it, and the demeanor of that witness may be such as to convince the trier that the truth lies directly opposed to the statements of the witness. NLRB v. Howell Chevrolet Co., 9 Cir., 204 F. 2d 79, 86, aff'd *sub. nom.* Howell Chevrolet Co. v. NLRB, 346 U. S. 482; Chow Sing v. Brownell, 9 Cir., 217 F. 2d 140, 143; Lew Wah Fook v. Brownell, 9 Cir., 218 F. 2d 924; Mar Gong v. Brownell, 9 Cir., 209 F. 2d 448, 449, 450; Wigmore on Evidence, Third Ed., Vol. VII, §2034 n. 3; Zimmer v. Acheson, 10 Cir., 191 F. 2d 209, 212. This rule is particularly true where the witness is interested in the outcome of the case, or where his testimony is improbable or contains patent omissions and inconsistencies. Quock Ting v. United States, 140 U. S.

417, 420; Zimmer v. Acheson, *supra*. We think that the testimony of the plaintiff in the present case, as revealed in the record and summarized and set out above in part, clearly brings it within this rule, and entitled the Court to find that the fact were otherwise than stated by the plaintiff, and by clear and convincing proof, if need be. Under no circumstances can it be said that they are "clearly erroneous" within the meaning of Rule 52(a) of the Rules of Civil Procedure, and hence they cannot be set aside by this Court.

The Court was not required to believe that appellant was himself the victim of terror conditions in Japan. In discussing a similar contention in this Court in Coumas v. Brownell, 9 Cir., 222 F. 2d 331, 1955, Chief Judge said:

> "Coumas first contends that since expatriation must be caused by his 'voluntary' act, *Perkins v. Elg*, 307 U. S. 325, 334, 59 S. Ct. 884, 83 L. Ed. 1320, his entry into the Greek army was involuntary because he was *inducted* into it. It nowhere appears that he protested his induction, and he voluntarily went to Greece presumably knowing that under the Greek law he, a Greek citizen, might be conscripted into the army. Cf. *Dos Reis ex rel. Camara v. Nicolls*, 1 Cir., 161 F. 2d 860."

This language is particularly descriptive of the facts in the instant case.

Neither the facts found by the District Court nor the inferences from those facts can be set aside by this Court unless "clearly erroneous." The record here amply supports the conclusion of the lower court, that the act of the plaintiff in entering the Japanese army was a voluntary act.

Appellant further complains of the refusal of the lower court to admit in evidence the passport application of appellant. There appears to be no error in this ruling. In any event the appellant testified upon the trial to all of the important facts which appeared in the passport application.

It is further contended that the recent decision in Gonzales v. Landon, 350 U. S. 920, means that this case should be reversed, inasmuch as the Court there said that proof of expatriation must be by "clear and convincing" evidence, and that this was not done here. We do not agree. First, the Gonzales case only dealt with §401(j) of the 1940 Act which provides that a person expatriates himself when he remains out of the country "for the purpose of avoiding service in the armed forces of the United States." This ground of expatriation, unlike the one in issue here, requires a mental element in the expatriating act itself. This is all the more clear by the fact that the cases cited by the Supreme Court for its authority dealt also with conduct requiring a certain mental element. Baumgartner v. U. S., 322 U. S. 665, 1943; Schneiderman v. U. S., 320 U. S. 118, 1942. Secondly, the fact that appellant here performed the act that is proscribed by §401(c), to-wit, entering and serving in the armed forces of Japan, was established by clear and convincing evidence—in fact, it was pleaded by plaintiff in his complaint and admitted in the answer.

Appellant further contends that §401(c) of the 1940 Act which is here under consideration, is unconstitutional. This Court has already held other sections of the same Act providing for expatriation to be constitutional. As to §401(j), Vidales v. Brownell, 9 Cir., 217 F. 2d 136, 138; Gonzales v. Landon, 9 Cir., 215 F. 2d 955, rev'd on

other grounds, 350 U. S. 920; as to §401(e), Miranda v. Clark, 9 Cir., 180 F. 2d 257. There is nothing in these previous holdings of this Court to indicate that the same result should not be reached as to §401(e). Moreover, the many cases from other circuits, cited above, which have considered expatriation under §401(e) have assumed that it is constitutional. Appellant asserts that all persons born in the United States are citizens by virtue of the Constitution and that Congress is powerless to enact laws which will deprive a native born American of his citizenship absent a voluntary renunciation by such person. That Congress has such power was established in Mackenzie v. Hare, 239 U. S. 299. In our view, the claim of unconstitutionality lacks merit.

The judgment of the District Court is affirmed.

(Endorsed:) Opinion. Filed Jun. 18, 1956.

Paul P. O'Brien, Clerk.

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Mitsugi Nishikawa, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. No. 14742.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came onto be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(ENDORSED)

Filed and entered June 18, 1956.

PAUL P. O'BRIEN,
Clerk.

Supreme Court of the United States

October Term, 1956

No. 415

Mitsuo Nishikawa,

Petitioner,

vs.

John Foster Dulles, as Secretary of State,

Reply to Memorandum of Respondent on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

A. L. Wirin,
Fred Okrand,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.
No. 415

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

Reply to Memorandum of Respondent on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

In its Memorandum, the Government does not oppose the grant of certiorari in this case (Memo, pg. 13).

However, it can hardly be said, as does respondent (Memo, pg. 12) that the constitutionality of Section 401(c) of the Nationality Act of 1940 "has now been established." No decision of this Court has so held. As authority respondent cites its own brief in *Gonzales v. Landon*, No. 111, Oct. Term, 1955. The contrary argument is set forth in petitioner's briefs in that case (Op. Br. pp. 6-18; Rep. Br. pp. 25-31), including the refutation of respondent's argument based upon *Mackenzie v. Hare*, 239 U. S. 299, and *Savorgnan v. United States*, 338 U. S. 491, also cited by respondent here (Memo. pg. 12).

It is noteworthy that after the remands by this Court of *Acheson v. Okimura*, 342 U. S. 899, and *Acheson v. Murata*, 342 U. S. 900, the trial court again held the statute unconstitutional (111 F. Supp. 303 and 306) and did so in the later reported case of *Terada v. Dulles*, 121 F. Supp. 6 (as to subsection (e)), as well as in several unreported cases. The Government took appeals in none of these cases.

In the latest case before this Court wherein the constitutional question was involved (*Gonzales v. Landon*, No. 111, Oct. Term, 1955), not only did this Court grant unlimited certiorari (349 U. S. 943), but in its opinion in deciding the case (350 U. S. 920) stated that it was not reaching the constitutional questions. While one may not be able to claim this action as conclusive authority that after the argument in *Gonzales* this Court felt the question to be open,[1] the overall action taken by this Court in that case on the problem is persuasive that that is the case. The opinion does make clear that the question has not been decided.

As the Government concedes (Memo. pp. 12, 13) the question of the constitutionality of the subsection here involved, as well as related provisions of the expatriation statute, is a continuing and recurring one. For example, see *Perez v. Brownell*, No. ....., Oct. Term, 1956, petition for writ of certiorari just filed. In the Supplement to

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[1]It can be said that it felt that way at the time of granting the petition.

the Petition for Writ of Certiorari in that case the suggestion was made that if this Court grants certiorari in that case and in this one, that the cases be set down for argument, one to follow the other. We respectfully make the same suggestion here.

Respectfully submitted.

A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 319

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1956.

No. 415

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

Opinions Below.

No opinion was written by the trial court.

The opinion of the court below [R. 65-75] is reported at 235 F. 2d 135.

Jurisdiction.

This is a review of a judgment of the United States Court of Appeals for the Ninth Circuit in a civil case entered on June 18, 1956 [R. 76]. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). The petition was timely filed (Rule 22(3) of this Court; 28 U. S. C. 2101(6)) on September 13, 1956 [R. 77].

Constitutional Provisions and Statute Involved.

Section 401(c) of the Nationality Act of 1940 (54 Stat. 1168; 8 U. S. C. (1946 Ed.) 801(c)):

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> ". . . .
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state";

Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

Questions Presented for Review.

1. Should Section 401(c) of the Nationality Act of 1940 (54 Stat. 1168; 8 U. S. C. 801(c))[1] be so interpreted as to impose compulsory loss if citizenship upon a native born United States citizen under the facts of this case—namely, obedience to the compulsory military conscription laws of Japan by a United States citizen temporarily residing in that country, he also, under the

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[1]Now covered by 8 U. S. C. 1254(a)(3).

laws of that country having the nationality thereof, or should the statute, in order to avoid a grave constitutional question, be so interpreted as not to impose loss of citizenship on one who, while in a foreign country and subject to the laws thereof, obeys the laws of that country?

2. In expatriation cases arising under Section 401(c) of the Nationality Act of 1940, is the same standard of proof required as in denaturalization cases and as in cases arising under Section 401(j) (54 Stat. 1137; 8 U. S. C. 801(j))?

3. Upon whom is the burden of proving the nature of the conduct under Section 401(c)—the Government to show that the conduct was voluntary, or the citizen to show that the conduct was involuntary?

4. Where the military service referred to in Section 401(c) of the Nationality Act of 1940, is pursuant and in obedience to the compulsory military conscription law of the foreign country, does a rebuttable presumption arise that such service is involuntary?

5. Irrespective of where the burden of proof may lie in an expatriation case arising under Section 401(c) of the Nationality Act of 1940—whether that burden be upon the Government to show, by clear, convincing and unambiguous evidence, that the military service was voluntary, or it be upon the Government to overcome the presumption of involuntary conduct which arose by reason of the fact that petitioner's military service was pursuant to his being drafted under the compulsory Japanese Military Service Law, or whether it be upon petitioner to show that his service was involuntary—was petitioner's military service in Japan voluntary so that, constitutional and interpretation questions aside, he is to be held to have

lost his United States nationality in the light of the rule that in matters involving citizenship, the facts and the law are to be construed as far as is reasonable in favor of the citizen?

6. If the answers to the previous questions are such as to be against petitioner, is 8 U. S. C. 801(e) unconstitutional, on its face and as applied in this case, under the citizenship clause of the Fourteenth Amendment and/or under the due process clause of the Fifth Amendment?

Statement of the Case.

Petitioner was born in Artesia, California on April 20, 1916 [R. 10]. He was by United States law (Fourteenth Amendment) and by Japanese law [R. 34] a citizen of both countries by birth.[2] Until he went to Japan in August, 1939 [R. 18], petitioner lived all of his life in the United States and was educated in the schools in the United States. [R. 18]. In 1939 petitioner went to Japan in order to visit and study, intending to remain between two to five years [R. 26]. His mother and father remained in the United States [R. 29, 30]. He travelled on an American, not a Japanese passport [R. 39-40].[3]

When he got to Japan, petitioner started to study under a tutor in Japanese language [R. 35], he not being able to read Japanese characters [R. 29], but when his

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[2]There is no evidence in the record as to the nationality law of Japan nor as to any of the facts necessary to make one a Japanese national under Japanese law.

[3]The trial court refused to admit the passport application, which showed on its face that Passport No. 44632, San Francisco Series, was issued to petitioner, into evidence [R. 41]. Under *Fong Wong Jung v. Dulles*, 349 U. S. 941, this was error.

father died in November, 1939 [R. 35], he had no funds and so had to go to work (*Ibid.*). Around June, 1940, pursuant to the Japanese compulsory military conscription law, [R. 22-23] he was required to take a physical examination [R. 18] and on March 1, 1941, pursuant to the same law, he was drafted into the army (*Ibid.*). Under the Japanese Military Service Law, service by petitioner was compulsory [R. 23] and said law provided for criminal punishment for evasion thereof (*Ibid.*).

When he received the notices to report for physical examination and to report for induction, he was afraid not to comply because he heard rumors that the Kempei Tei[4] would throw persons who tried to dodge the draft into prison [R. 37], or beat them [R. 47] and he even heard of one case of a boy who was bayoneted by them and killed [R. 37].

At the time here involved, the government of Japan was tyrannical and despotic, with the military controlling the country. Even high officials were killed in their homes [R. 37]. The police made monthly checks of the boarding house where petitioner lived [R. 44].[5]

The well known ruthlessness of the regime in power in Japan during this time is a matter of such general public history that this court can take judicial notice

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[4]The Kempei Tei were the dreaded Japanese military police which held the people in Japan generally in fear. *See Kanno v. Acheson*, 92 F. Supp. 183, 184 (D. C. S. D. Cal., 1950); *Kato v. Acheson*, 94 F. Supp. 415, 416 (D. C. S. D. Cal., 1950). And *cf. Fukumoto v. Dulles*, 216 F. 2d 553, 555 (C. A. 9, 1955) and the Murayama deposition therein referred to.

[5]*Cf.* page 3, Murayama deposition in *Fukumoto v. Dulles*, 216 F. 2d 553, detailing the surveillance under which Nisei (first generation American-born persons of Japanese ancestry) were kept by the police.

thereof.[6] It was under these circumstances that petitioner obeyed the Japanese law.[7]

While in the army, petitioner was asked by non-commissioned officers, because he was born and raised in the United States, what he thought would be the outcome of the war [R. 38]. He replied that "there wouldn't be any chance of Japan winning the war at all." [R. 38.] For this indiscretion, he "was called up by the enlisted personnel of higher rank and . . . given a thorough beating." (*Ibid.*) After that he was beaten about every

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[6] *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 516, 590, 591, 10 L. Ed. 274, 309; *Sparrow v. Strong*, 3 Wall. (U. S.) 97, 18 L. Ed. 49, 50; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187, 188; *The Appollon*, 9 Wheat. (U. S.) 362, 374, 6 L. Ed. 111, 114.

For the purpose of aiding the Court in its judicial knowledge, we are lodging with the clerk of this Court, as was done in the court below, certain documents of the contents of which this Court can take judicial notice. These documents are:

1. "Education in the New Japan," published by Supreme Commander for the Allied Powers (SCAP), Civil Information and Education Section, Tokyo, 1948;

2. SCAP, Summation of Non-Military Activities in Japan and Korea, No. 3, December, 1945;

3. SCAP, Summation No. 1, September-October, 1945;

4. SCAP, Two Years of Occupation, Tokyo, 1947;

5. SCAP, A Brief Progress Report on the Political Reorientation of Japan, Tokyo, 1949;

6. Deposition of Kiyoshi Togosaki;

7. Deposition of Tamotsu Murayama;

8. Deposition of Hidemitsu Matsuki.

Some, or all, of these documents were introduced and received in evidence in numerous cases involving the issues of this case. *E.g. Kato v. Acheson*, 94 F. Supp. 415 (D. C. S. D. Cal., 1950); *Kanno v. Acheson*, 92 F. Supp. 183 (D. C. S. D. Cal., 1950); *Yoshida v. Dulles*, 116 F. Supp. 618 (D. C. D. Haw., 1954).

As to the official publications of SCAP (items 1 through 5), it is clear that this court may take judicial notice of their contents by reason of that fact alone. As to the depositions (items 6-8), they being part of the records of the district courts (and having been admitted into evidence usually without objection; the Mitsuki

day for a month and a couple days each month following (*Ibid.*). While he was in the army, his nickname was "America" (*Ibid.*). He was discharged at the end of the war [R. 19].

After the war, petitioner was denied a passport to return to the United States by the American Consulate at Yokohama on the ground that he had lost his United States citizenship by reason of his service in the Japanese Army [R. 12].

Hence this law suit.

The Government introduced no evidence [R. 49-50].

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deposition, indeed, being taken by the Government) notice may be taken thereof as well." These principles are substantiated in the following cases:

N.L.R.B. v. F. C. Atkins Co., 331 U. S. 398, 406, where the Supreme Court took judicial notice of the contents of a circular issued by Headquarters, Army Service Forces. The court said:

> "Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483, 484."

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 375, where the court took judicial notice of a practice in the administrative office of the United States courts; *Trupel v. United States*, 248 U. S. 121, 126, where the court took judicial notice of the contents of reports of the Secretary of War. In *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483, 484, the court took judicial notice of an order of Army Headquarters establishing post exchanges.

That this is the view of the Government is seen from its brief in *Hirabayashi v. United States*, 320 U. S. 81, where at page 11 it is said that "facts (appearing) in official documents . . . are peculiarly within the realm of judicial notice" citing innumerable cases.

See also as to the right to notice the facts revealed by the records of the District Courts: *Savage v. U. S. District Court*, 144 F. 2d 575 (C. C. A. 9, 1944); *Armstrong v. Alliance Trust Co.*, 126 F. 2d 164, 167 (C. C. A. 5, 1942). And compare *Falbo v. United States*, 320 U. S. 549, 553, fn. 7.

[7] *Cf. Acheson v. Maenza*, 202 F. 2d 453, 459 (C. D. D. C., 1953).

Summary of Argument.

There can be no expatriation from American citizenship unless the citizen acts voluntarily. In cases such as these the Government's burden is to show such conduct by evidence that is clear and convincing and not such as to leave the issue in doubt. Such evidence the Government did not produce here. Indeed, in this case, the Government introduced no evidence whatsoever.

At least, the Government's burden is to overcome the presumption that petitioner acted involuntarily. Since petitioner was drafted into the Japanese Army pursuant to law, carrying criminal penalties for violation thereof, the presumption is that his service was involuntary. Accordingly, judgment must be for the citizen since the government produced no evidence overcoming the presumption.

In any event, on the ordinary burden of proof, petitioner showed his service to have been involuntary. The trial court's holding to the contrary is clearly erroneous, it not having applied the principle that in matters involving the taking away of citizenship "the facts and the law should be construed as far as is reasonable in favor of the citizen."

Following accepted principles, the statute involved in this case should be so construed as to avoid a constitutional issue. Since petitioner had Japanese nationality, resided in Japan at the time and acted pursuant to the law of the country in which he was residing, Section 401(c) should not be construed to apply to this case to effect loss of citizenship.

If the statute is construed to apply to such facts, it is unconstitutional because Congress has no power to take away constitutionally endowed citizenship absent consent of the citizen with knowledge of the consequences and if Congress does so do, its action is arbitrary and a denial of due process.

ARGUMENT.

I.

Respondent Did Not Meet the Burden Required of Him in Order to Take Away Petitioner's United States Citizenship.

A.

In Order to Take Away One's United States Citizenship, the Burden Is Upon the Government to Prove by Clear, Convincing and Unequivocal Evidence All the Elements of Expatriation.

Certain principles are undisputed on the general question of expatriation from United States citizenship: there can be no expatriation unless there is a voluntary renunciation or abandonment of nationality; citizenship is a precious right that cannot be lightly taken away; ambiguous or equivocal conduct is not sufficient to cause loss of citizenship; United States citizenship is not to be taken away or deemed forfeited except in the clearest cases; the evidence in this regard must be clear, unequivocal and convincing, and not by a mere preponderance which leaves the issue in doubt. (*Cf. Perkins v. Elg*, 307 U. S. 325; *Gonzales v. Landon*, 350 U. S. 920; *Dos Reis, ex rel. Camara v. Nicolls*, 161 F. 2d 860 (C. C. A. 1, 1947); *Podea v. Acheson*, 179 F. 2d 306 (C. A. 2d, 1950); *Schneiderman v. United States*, 320 U. S. 118, 125; *Baumgartner v. United States*, 332 U. S. 665, 670; *Mandoli v. Acheson*, 344 U. S. 133, 193; *Acheson v. Maenza*, 202 F. 2d 453 (C. A. D. C., 1954); *Monaco v. Dulles*, 210 F. 2d 769 (C. A. 2, 1954).)

This means that the Government must show, and by the strict standard of proof required, not only that the citizen performed the physical acts denounced by the ex-

patriating statute,* but also, and by the same heavy degree of proof, that other all important element: that he did so voluntarily. It is the Government's burden, when it seeks the immense forfeiture it does here, to prove voluntary conduct, rather than the citizen's burden to prove involuntary conduct. (*Gonzales v. Landon*, 350 U. S. 920; *Anciello v. Dulles*, 220 F. 2d 344, 345 (C. A. 2, 1955); *Lehmann v. Acheson*, 206 F. 2d 592, 598 (C. A. 3, 1953); *Schioler v. Secretary of State*, 175 F. 2d 402, 403 (C. A. 7, 1949); *Stipa v. Dulles*, 233 F. 2d 551, 556 (C. A. 3, 1956); *Bruni v. Dulles*, 235 F. 2d 855, 856 (C. A. D. C., 1956).) That the Government followed the incorrect view of the law on this point is seen from the fact that it introduced not one shred of evidence in the case, thus obviously being content to rest on the theory that *petitioner* did not prove his case. That the trial court fell into the same error is seen from the fact that as soon as petitioner had rested, the court immediately asked Government counsel whether he rested [R. 49] to which an affirmative reply was made [R. 50]. That the Court below fell into the same error is seen from its express statement [R. 73]:

> ". . . the burden (is cast) upon the plaintiff to show that his entry into the armed forces was involuntary."

In so doing, the court below, while acknowledging [R. 71] "that the act of expatriation must be a voluntary act on the part of the plaintiff in order to effect an expatriation," and while approving language in *Pandolfo v. Ache-*

*Here, that he served in the armed forces of a foreign state and had the nationality of that state; two elements which are not in dispute.

son, 202 F. 2d 38, 40 (C. A. 2, 1953); that "the Government . . . had the burden of showing that he had expatriated himself," disregarded the fact that the voluntary aspect of the case is just as much a part of the Government's case as any other; for "the very essence of expatriation is that it be voluntary." *Dorean v. Marshall*, 170 F. 2d 721, 723 (C. A. 3, 1948). This is so because by its very definition "expatriation is the *voluntary* renunciation or abandonment of nationality and allegiance." *Perkins v. Elg*, 307 U. S. 325, 334. (Italics added.) If there can be no expatriation *unless* the act is voluntary, and if the Government has the burden of proving expatriation, the Government must, perforce, prove that the act is voluntary, and by the same heavy quantum of proof as any other element, for without such proof, there is no expatriation.

Prior to this Court's decision in *Gonzales v. Landon*, 350 U. S. 920,[9] the Court of Appeals for the Third Circuit had said (*Lehmann v. Acheson*, 206 F. 2d 592, 598):

> "It was the District Court's view that Lehmann bore the burden of establishing that his service in the Swiss Army and his taking of an oath of allegiance to Switzerland were involuntary. In that respect the District Court erred. . . ."[10]

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[9] "The Court is of the view that the standard of proof required in denaturalization cases (see Schneiderman v. United States, 320 U. S. 118; Baumgartner v. United States, 322 U. S. 665) is applicable to expatriation cases arising under §401(j) of the Nationality Act of 1940, 54 Stat. 1137, as amended. . . ."

[10] Followed in *Augello v. Dulles*, 220 F. 2d 344, 345 (C. A. 3, 1955) and *Stipa v. Dulles*, 233 F. 2d 551, 556 (C. A. 3, 1956).

Following this Court's decision in *Gonzales*, the Court of Appeals for the District of Columbia held the same way in *Brunn v. Dulles*, 235 F. 2d 855, 856:

> "... the voluntary character of such acts (joining the armed forces, participating in a mass swearing of allegiance, voting) must be proved (by the Government) under the strict standards above referred to."

We believe the Third Circuit was correct in law in its *Lehmann*, *Augello* and *Stipa* decisions and that the District of Columbia Circuit, in its *Brunn* decision, correctly interpreted this court's decision in *Gonzales*.[11]

The court below erred, we submit, when it held [R. 74, 75] that the Gonzales principle applied only to Section 401(j) and not to 401(c) and when it held [R. 74, 75] that since petitioner had pleaded (and respondent had admitted in the answer) that he had entered and served in the armed forces of Japan, expatriation had been shown by the clear and convincing evidence required. In so doing, the court below not only disregarded the indispensable element of voluntary conduct essential before expatriation can be effected, but also misapprehended what was involved in the *Gonzales* case and, therefore, the purport of this Court's decision in it. The court below confused the element of intent (the court's words were "mental element" [R. 75]) with the element of voluntariness. They are not the same. Under Section 401(j) of the

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[11] *Cf. United States v. Minker*, 350 U. S. 179, 193 (Mr. Justice Black concurring):

> "But citizenship, whether acquired by birth or by naturalization, cannot be taken away without a judicial trial in which the Government carries a heavy burden." (citing, *inter alia*, the *Gonzales* case)

1940 Act (58 Stat. 746; 8 U. S. C. (1946 Ed.) 801 (j)), merely remaining outside the United States in time of war for the purpose of evading or avoiding military service, is no more expatriating than merely serving in a foreign army while having the nationality of that state is expatriating under Section 401(c). In both instances the conduct must be voluntary. And, just as this Court said in *Gonzales* as to Section 401(j), so too, must be the rule as to 401(c); that the Government must prove all the elements by the strict standard of proof required in the denaturalization cases. The specific intent to evade or avoid military service does not, as the decision below implies, mean that a person has expatriated himself. One may very well remain outside the United States for the purpose of evading or avoiding military service, but this does not mean that he did so voluntarily. And without its being voluntary, there is no expatriation. This was the precise issue in *Gonzales*.

An examination of the record in *Gonzales* makes it very clear that Gonzales remained outside the United States in time of war "for the purpose of evading or avoiding military service." For example, Gonzales said, *inter alia:*

[R. 17-18]:

> "I would have come to the United States in 1944 or 1945 had it not been for the requirement to register."

[R. 20]:

"Yes" (in response to the question) [R. 19-20]:

> "Do you admit that you remained outside of the jurisdiction of the United States from September 1944 until April 23, 1946 for the purpose of evading

> or avoiding training and service in the land and naval forces of the United States?"

There was other evidence of a similar vein.

But Gonzales' cry to the courts was that though he remained outside the jurisdiction of the United States during time of war *for the interdicted purpose*, he did so involuntarily because his mother would not let him come. The fact that his mother would not let him come to the United States did not change the fact that he did the very thing which the statute, read literally, says is expatriating. But, because the Government has to prove all the elements of expatriation, including voluntariness, this Court reversed, since the Government's proof on this issue did not rise to the standard required. In other words, the crucial factual issue in the case was whether Gonzales' remaining outside the United States was voluntary, not whether his remaining out was for the purpose of avoiding military service.

In his Opening Brief in this Court, Gonzales said (p. 26):

> "The Government Did Not Produce Evidence Meeting the Standard of Proof Required . . . . (S)ince it is the Government's burden to establish the expatriation, this burden, and by the same degree of proof, must be carried as to all elements of the case. This mean's that the Government must thus prove, by this high standard of proof, not only that petitioner remained outside of the United States for the purpose interdicted by the statute but *also that he did so voluntarily*." (Italics added.)

And (pp. 30-31):

> "On this issue, the Government presented no proof. . . . It is immaterial whether (plaintiff's evidence)

> is sufficient proof to *establish* that petitioner's remaining away was *involuntary*. The point is that, absent positive proof by the Government in this type of case, it (plaintiff's proof, which, incidentally, the trial court did not believe, 215 F. 2d 957) casts sufficient doubt on the Government's case to establish that the remaining away for the interdicted purpose was voluntary." (Italics in original.)

And nearly one-half (Point I, D) of Petitioner's Reply Brief was devoted to pointing out how the Government's proof did not measure up to the standard required, especially on the voluntary issue.

In its brief, the Government, after pointing out (pp. 17-18) that the trial court did not believe Gonzales,[12] said (p. 22):

> "Petitioner cannot fairly claim that his mother's influence after he had grown up, amounted to duress *excusing* his remaining abroad." (Italics added.)

This statement by the Government in its brief points up the feature of the *Gonzales* case and of Section 401(j) of the 1940 Act which the court below overlooked. That feature is that two of the elements of that statute are completely objective and have nothing to do with intent specific or otherwise, namely: (1) remaining outside the United States; (2) during time of war. These two elements, just as the military service and Japanese nationality in the case at bar, were admitted in the *Gonzales* case. It is as to proof that the remaining out was voluntary,

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[12]The trial court in *Gonzales* said (R. 33): "When a boy of that kind comes in and tells me his mother wouldn't let him out of the house, he couldn't come because his mother wouldn't let him out of the house, I don't know how such foolish statements can be made."

that the Government's case in *Gonzales* fell down. As noted from the Government's brief in *Gonzales*, it was there contending (p. 22, where it talks about petitioner "excusing his remaining abroad") just as the court below here ruled [R. 73] that plaintiff must prove the involuntary character of his act.

As seen, the Government failed in its argument. Since the Government did not prove, by the strict quantum of proof, that Gonzales' remaining away was voluntary, it did not prove expatriation. The same principle should have been, and must be, applied to the case at bar.

B.

On the Ordinary Burden of Proof, Even if Petitioner Had One Here, His Service in the Japanese Army Was Involuntary.

(1)

MILITARY SERVICE BY REASON OF CONSCRIPTION, CREATES A REBUTTABLE PRESUMPTION OF INVOLUNTARINESS. RESPONDENT DID NOT OVERCOME THIS PRESUMPTION.

There is no dispute about the fact that appellant was drafted in the Japanese Army [R. 18, 56, 57] under the compulsory military service law which provided criminal penalties for violation thereof [R. 22-23]. Contrary to what we believe the law to be, the court below held [R. 73]:

> "There is no presumption that one who is conscripted into the armed forces enters voluntarily. . . ."

Not only is this statement of law contrary to that of the Third,[13] Second[14] and District of Columbia[15] Circuits, on the precise question, but it is contrary to what this and other courts have said in this and other situations as to the involuntary nature of conduct under the compulsion of law.

In *Mandoli v. Acheson*, 344 U. S. 133, 135, this Court pointed out that:

> "The Government abandoned the first ground because the Attorney General ruled that such service in the Italian army by one similarly situated could only

[13] *Lehmann v. Acheson*, 206 F. 2d 502, 504:

> "Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish *prima facie* that his entry and service were involuntary.
>
> "Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in the Swiss Army as a result of his conscription were involuntary."

[14] *Augello v. Dulles*, 220 F. 2d 344, 347:

> "The opinion of the court below shows that on the issue of duress the fact of the plaintiff's conscription was disregarded. And since there was no evidence to rebut the inference of duress flowing from the plaintiff's status as a conscript, there is no need to remand for further findings.
>
> "Reversed with a direction to grant the declaration sought."

[15] We believe that the purport of the District of Columbia Circuit's reasoning in *Bruni v. Dulles*, 235 F. 2d 855, 856 regarding the importance of conscription, when coupled with that Circuit's explanation of the appropriate criteria in *Soccodato v. Dulles*, 220 F. 2d 243, (in which it cited with approval [245 and 246] the Third and Second Circuit opinions in *Perri v. Dulles*, 206 F. 2d 586 and *Augello v. Dulles*, 220 F. 2d 344) and when viewed in the light of the other actual decisions of that Circuit in holding in favor of the citizen in this type of case (*Allata v. Dulles*, 221 F. 2d 52; *De Marco v. Dulles*, 226 F. 2d 265; *Bocce v. Dulles*, 226 F. 2d 265; *Saiti v. Dulles*, 226 F. 266; *Acheson v. Maenza*, 202 F. 2d 453) justify the conclusion that that circuit, as well, looks upon conscription as creating a presumption of involuntariness.

be regarded as having been taken under legal compulsion amounting to duress.'"

This confession of error by the Attorney General and the concurrence therein by this Court is not to be treated lightly. It is firmly established that this Court is in no way bound by a confession of error by the Government and will examine independently the issues involved. As the Court said in *Gibson v. United States*, 329 U. S. 338, 344, n. 9:

> "A confession of error on the part of the United States 'does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.' *Young v. United States*, 315 U. S. 257, 258-259."[18]

In the Attorney General's opinion (41 Ops. Atty. Genl. No. 16) referred to in the *Mandoli* case, the Attorney General had said:

> ". . . Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to accomplish expatriation. . . ."

We believe this is just another way of saying that military service due to conscription raises a presumption of involuntary conduct.

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[18]Indicative of the importance given by the Court to its independent re-examination is that, in at least one instance, *Weber v. United States*, 315 U. S. 787, the judgment of the lower court was affirmed despite the Government's confession of error. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 Ed.), p. 666.

Noting the anomalous position of the Government in the *Lehmann* case as compared with its concession in the *Mandeli* case, 344 U. S. 133,[17] the court said (209 F. 2d 590):

> "We can see no valid reason for making any distinction between service by conscription in the Swiss Army, for in both instances the conscript acts under compulsion of law and the duress sanctions in the event of non-compliance."

In *Adams v. Maryland*, 347 U. S. 179, this Court affirmed, in effect what the Courts of Appeal had said in the *Lehmann*, *Perri* and *Angello* cases. In the *Adams* case this Court recognized that one who appeared before a Senate investigating committee by virtue of having been subpoenaed did not act voluntarily. The court said (347 U. S. at 181):

> ". . . He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail."

See also *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 363, commenting on the coercive nature of a subpoena, and *Kawakita v. United States*, 343 U. S. 717, 728, where the court notes the difference between one who is drafted and one who volunteers.[18]

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[17] With which this Court agreed. "The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all." (344 U. S. at 135.)

[18] Cf. also *Pedersen v. National Labor Relations Board*, 234 F. 2d 417, 419 (C. A. 2, 1956): "Here the act which resulted in petitioner's loss of employment was not *induced* by Board action, rather it was *compelled* by the Board. The Board subpoenaed Pedersen to testify. If he had not responded to the subpoena he might well have been compelled to testify by a court order issued under 29 U. S. C. A. §161(2)." (Italics in original.)

Accordingly, we submit, the law is that military service due to conscription raises a presumption of involuntary conduct, and, as a matter of law, since respondent failed to overcome that presumption, petitioner is entitled to a reversal.

(2)

IRRESPECTIVE OF THE PRESUMPTION, THE COURTS BELOW DISREGARDED THE PRINCIPLE THAT IN MATTERS INVOLVING LOSS OF CITIZENSHIP "THE FACTS AND THE LAW SHOULD BE CONSTRUED AS FAR AS IS REASONABLE IN FAVOR OF THE CITIZEN." IN SO DOING, THEIR HOLDINGS THAT PETITIONER ACTED VOLUNTARILY IS CLEARLY ERRONEOUS.

The law is clear, that in matters involving loss of citizenship, whether by way of denaturalization or expatriation (*Gonzales v. Landon*, 350 U. S. 920), "the facts and the law should be construed as far as is reasonable in favor of the citizen." (*Schneiderman v. United States*, 320 U. S. 118, 122.) In *Baumgartner v. United States*, 322 U. S. 665, 670, 671, this Court went to great pains to distinguish the considerations in the usual type of case and one involving, as here, "a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen." (322 U. S. at 670.)

The court below disregarded these principles and admonitions by this Court. As a result, the decision below stands virtually alone and is out of line with the overwhelming weight of appellate authority, most of which

have been reversals of cases in which there had been actual findings of voluntary conduct by the trial courts.[19]

The facts in this case, which this Court will scrutinize very closely in a case of this kind (*Baumgartner v. United States*, 322 U. S. 665, 671), are such that even irrespective of the court below's failure to apply the correct standard, as set out above, a finding of voluntary conduct is clearly erroneous, whether expressed in terms of resolving factual doubts in favor of citizenship, or in terms of the necessity of proving expatriation by clear, unequivocal and convincing evidence. (*Soccodato v. Dulles*, 220 F. 2d 243, 247 (C. A. D. C., 1955); *Stipa v. Dulles*, 233 F. 2d 551, 556 (C. A. 3, 1956).)

The evidence is that, not only did petitioner respond to the draft call because required to do so by law, but that he feared drastic treatment at the hands of the Kempei Tei if he failed to so do [R. 37, 47]. This evidence, when viewed against the background of totalitarian, mili-

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[19] See, *e.g. Alata v. Dulles*, 221 F. 2d 52 (C. A. D. C., 1955); *Soccodato v. Dulles*, 220 F. 2d 243 (C. A. D. C., 1955); *DeMarco v. Dulles*, 220 F. 2d 265 (C. A. D. C., 1955); *Bocco v. Dulles*, 220 F. 2d 265 (C. A. D. C., 1955); *Santi v. Dulles*, 220 F. 2d 266 (C. A. D. C., 1955); *Acheson v. Maenza*, 202 F. 2d 453 (C. A. D. C., 1953); *Angello v. Dulles*, 220 F. 2d 344 (C. A. 2, 1955); *Lehmann v. Acheson*, 206 F. 2d 592 (C. A. 3, 1952); *Mendelsohn v. Dulles*, 207 F. 2d 37 (C. A. D. C., 1953); *Monaco v. Dulles*, 210 F. 2d 700 (C. A. 2, 1954); *Pandolfo v. Acheson*, 202 F. 2d 38 (C. A. 2, 1953); *Poon v. Dulles*, 206 F. 2d 500 (C. A. 3, 1953); *Podea v. Acheson*, 179 F. 2d 306 (C. A. 2, 1950); *Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 800 (C. A. 1, 1947).

taristic, tyrannical Japan,[20] shows coercion and compulsion of the strongest nature,[21] and courts which have considered the matter in similar cases have so recognized.

In *Kawato v. Acheson*, 92 F. Supp. 183 (D. C. S. D. Cal., 1950), the court said:

> "For some years prior to Pearl Harbor and until the surrender of Japan in 1945, Japan and its people were under the control of the military authorities of Japan, and the Secret or Thought Police, and the Special Higher Police; and during that period the people of Japan were generally in fear of them and particularly in fear of physical punishment, from the Japanese military authorities, the Secret Police and the Special Higher Police."

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[20]We have set out in Appendix "A" a few excerpts from official and other authoritative accounts of the nature of Japan at the time here involved. Fuller extracts have been lodged with the clerk of this Court. (See footnote 6 *supra*.) This Court can take judicial notice of their contents. (*N. L. R. B. v. F. C. Atkins Co.*, 331 U. S. 398, 406; *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483, 484; *Tempel v. United States*, 248 U. S. 121, 126; *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 375; page 11 of brief for government in *Hirabayashi v. United States*, 320 U. S. 81; *Maritime Union v. Herzog*, 78 F. Supp. 146 (D. C. D. C., 1948), aff'd 334 U. S. 854):

> "We judicially know the facts of current history and cannot close our eyes to them and to their significance."

United States v. Kusche, 56 F. Supp. 201, 206 (D. C. S. D. Cal., 1944):

> "A proposition which is common knowledge, and of which the court can take judicial notice, viz., that when Hitler came to power in 1933 he suspended the personal liberty provisions of that Constitution and thereupon and thereafter he established an absolute dictatorship based upon the tenets of national socialism."

Other cases in accord are: *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. Ed. 281, 296 (that the federal authority in Indiana was always unopposed); *The Apollon*, 9 Wheat. (U. S.) 362, 374, 6 L. Ed. 111, 114 (that smugglers infested that particular area); *Ponce v.*

In *Kato v. Acheson*, 94 F. Supp. 415, 416 (D.C. S.D. Cal., 1950), it was said:

> ". . . the plaintiff and other young American born Japanese, before the war was on and thereafter, found themselves in an atmosphere in Japan of being dominated by a cruel and unjust military government, although they had only gone to Japan to receive an education, and their desire and intention was to return to the United States, but were refused a passport. Their situation there is clearly reported as to such circumstances in the official report of General MacArthur to the United States after an investigation. He, after making an investigation, found that the military forces of Japan prior to and until Japan surrendered, ruthlessly and brutally dominated Japan regardless of the rights of all, and it is easy to

Roman Catholic Church, 210 U. S. 296, 309 (of the history of Puerto Rico and its legal and political institutions up to the time of its annexation by the United States); *DeWitt v. Hicks*, 161 F. 2d 787 (C. C. A. 9, 1947), cert. den. 332 U. S. 768 (military problems facing General DeWitt during the war); *Ex parte Zimmerman*, 132 F. 2d 442, 445 (C. C. A. 9, 1952), cert. den. 319 U. S. 744 (that the Hawaiian Islands and the Pacific area of the United States were faced with an imminent threat of invasion at the beginning of the war); *Hirota v. Wade*, 169 F. 2d 973, 976 (C. A. 10, 1948), aff'd 336 U. S. 684, reh. den. 337 U. S. 921 (that during the war in Europe, the United States armed forces were moving rapidly and conditions in the field were fluid); *In re Bush*, 84 F. Supp. 873 (D. C. D. C., 1949) (that on the surrender of Japan the American armed forces occupied Japan); *Coulton v. Sperry Gyroscope Co., Inc.*, 67 F. Supp. 219, 221 (D. C. E. D. N. Y., 1946) (of industrial conditions which existed in the nation during the period immediately before the war and during the war); *Atchison T. & S. F. R. Co. v. United States*, 284 U. S. 248, 260; *Skendzel v. Rose Manor Realty Co.*, 80 F. Supp. 619, 622 (D. C. E. D. Wisc., 1948); *The Pietro Campanella*, 73 F. Supp. 18, 27 (D. C. D. Md., 1947).

[21] *Cf. Acheson v. Maenza*, 202 F. 2d 453, 459 (C. A. D. C., 1953): "That testimony must be considered in connection with the well-known ruthlessness of the Fascist regime which, even as early as 1935, would hardly have tolerated resistance to its draft laws by an admitted national of Italy."

> ascertain the dominating atmosphere and situation this plaintiff and others were in which the military forces of Japan arbitrarily dominated."[22]

We have previously mentioned this Court's recognition in *Mandoli v. Acheson*, 344 U. S. 133, 135 that action under such circumstances is not voluntary. In that case this Court accepted the view of the Attorney General that

> ". . . 'The choice of taking the oath or violating the law was for a soldier in the Army of Fascist Italy no choice at all' . . ."

The reasoning of the court below in upholding the trial court's finding of voluntary conduct [R. 74] is based not upon what petitioner *did* do, but on what he did *not* do.[23]

We submit that this is a slender reed, indeed, upon which "to reduce a person to the status of alien from that of citizen." And it is a far cry from construing the facts as far as is reasonable in favor of the citizen. And, when measured in the light of the coercive conditions under which these "sins of omission" occurred (see Appendix "A", documents lodged with the Clerk of this Court and discussion, *supra*, pp. 21-24) the lack of substance to sustain the decision below appears overwhelming.

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[22]See also cases involving Italian military service cited *supra*, in footnote 19.

[23]*E. g.*, did not go to the American Consulate and tell them that he did not want to serve in the Japanese Army [R. 68]; did not tell any Japanese official that he was an American citizen [R. 68] (there is no showing in the record that the Japanese officials did not know this fact; it is to be assumed they did), did not make an effort to renounce his Japanese nationality [R. 68] (there is nothing in the record to show that there was any provision in Japanese law permitting such a thing or that, if there was, petitioner knew about it), did not protest against induction in the army or the taking of the physical examination [R. 69].

Moreover, we believe the correct view to be as stated by the Third Circuit in *Lehmann v. Acheson*, 206 F. 2d 502, 506:

> "An analysis of the District Court's opinion discloses that its determination was premised on acts of omission, rather than commission, on the part of Lehmann with respect to his service in the Swiss Army and attending circumstances.
>
> "The omissions enumerated in the opinion were:
>
> "(1) On his 1941 visit to the American consulate at Basel, Lehmann failed to furnish proof of his birth in the United States and failed to inquire how he could establish his American birth.
>
> "(2) On that same visit he did not ask specifically for the protection of the American consulate and expressed no desire to register as an American citizen.
>
> "(3) He did not protest at the time he entered the Swiss Army or at the time he took the oath of allegiance.
>
> "With respect to these 'omissions' it need only be said that they were utterly irrelevant to the critical issue of 'voluntariness.'"

The irrelevance of the argument is made the more apparent in *Monaco v. Dulles*, 210 Fed. 760 (C. A. 2, 1954), where the plaintiff in that case actually "ignored the warning of the State Department, made in response to Italian laws of dual nationality, to secure permission to enter Italy without liability for military service." (210 F. 2d at 761.) In that case the court pointed out that (*ibid.*):

> "Neither he nor any member of his family, nor a friend who accompanied him to Socco, ever made an attempt to secure the aid of American consular or diplomatic officials."

And see also the following:

Pandolfo v. Acheson, 202 F. 2d 38, 40:

> "Appellant (Government) stresses the fact that plaintiff did not protest to any United States consulate that he was being forced to enter Italian military service under duress."

United States v. Eliasen, 11 F. 2d 785, 786 (D. C. W. D. Wash., 1926):

> "Failure to register or report to consuls abroad is immaterial; . . ."

Soccodato v. Dulles, 226 F. 2d 243, 245:

> "His failure . . . to seek release from the army did not cause a loss of citizenship."

In *United States v. Di Re*, 332 U. S. 581, 594, this Court refused to "penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law" when it came to the question of whether there had been a loss of the constitutional protection against illegal search and seizure. Accord: *Johnson v. United States*, 333 U. S. 10, 13; *Amos v. United States*, 255 U. S. 313, 317. We suggest that likewise no such futility should be required when it comes to the question of loss of citizenship itself.[24]

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[24] In *Bergan v. Badham* (App. Dept., Calif. Superior Court; Los Angeles County, July, 1950 Los Angeles Daily Journal Reports, p. 12), attorneys signed *without protest* a document substituting them out as attorneys in a case. Their assignees instituted suit for reasonable value of services performed. The trial court found that the services performed were of greater value than the attorneys had been paid but nevertheless gave judgment to defendants on the ground that by not protesting the attorneys had in effect agreed not to be paid or had waived their right to payment. In reversing,

See also the Attorney General's view (41 Op. Atty. Genl. No. 16, referred to in the *Mandoli* case):

> ". . . While there is no evidence in the record bearing on whether a discharge could have been obtained, or, if so, whether Mr. Panzica was aware of the possibility, we can take note of the fact that it was the policy of the Italian Government to require military service of dual citizens who had resided for more than two years in Italy (3 Hackworth, *Digest of International Law* (1942), 189), and there is no apparent reason why Mr. Panzica should have expected that his case would be regarded by the Italian authorities as exceptional. Mr. Panzica also has stated that he believed that any request on his part for special treatment would have been futile. In these circumstances, I do not believe that his failure to seek a discharge from the Italian Army rendered either his continued service or his oath of allegiance a voluntary act resulting in expatriation."

While conceding [R. 37] that petitioner did not know when he went to Japan that Congress would adopt Section 401(c), and that he did not know when he went into the army that he would lose his citizenship, nevertheless the trial court based its ruling on the theory that petitioner "just refrained from protecting his rights as a citizen." [R. 56.] To just what rights the court had reference does not appear. If it meant a right to be excused, upon

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the appellate court (after pointing out that under the law a party is entitled to discharge his attorney) gave this intriguing example:

> "A man condemned to the gas chamber may put up a fight, when his executioners call upon him, or he may bow to the inevitable and go along quietly. If he pursues the latter course, the consent that he gives is not voluntary, but without choice. So was the consent given by plaintiff's assignors . . . in this case."

representations by the American Consulate on his behalf from Japanese military service because he was an American citizen, even though he was also a Japanese citizen living in Japan, there is simply no such "right". Not even the United States, which is a government of laws and not of the Kempei Tei, recognizes such a "right" (*Cf. Takeuma v. United States*, 156 F. 2d 437 (C. A. 9, 1946).) Moreover, even if appealed to, the American Consulate would make no such representation on petitioner's behalf (State Department Publication No. 1316, par. 29, p. 17): ". . . . . (i)t is not the practice of the (State) Department to make representations in his (a dual citizen's) behalf with a view to his release from the performance of military or other obligations to the foreign country."[28]

Furthermore, the theory that to retain one's United States citizenship, a dual citizen, must, in effect, "elect" between one and the other, is contrary to law (*Nishikawa v. Dulles*, 356 U. S. 129; *Kawakita v. United States*, 343 U. S. 717; *Perez v. Brownell*, 356 U. S. 44; *Trop v. Dulles*, 356 U. S. 86; *Nishikawa v. Dulles*, 356 U. S. 129; *Kichi v. Dulles*, 356 U. S. 30; *Kamada v. Dulles*, 356 U. S. 25; *Mandoli v. Acheson*, 344 U. S. 133).

A second facet of the reasoning of the court below in affirming the trial court is that the trial court was not re-

[28]That the trial court was of the erroneous view that the petitioner could, or the American Consulate would, do something about getting him out of military service, is seen from these questions asked by the court [R. 48]:

"The Court: So, even though you were a United States citizen you made no effort at all to find out whether you could get out of serving in the Japanese army when you didn't want to serve in the Japanese army? They could force you to even though you didn't want to? They could force an American citizen to serve in the Army?

. . . . . .

"The Court: And then you believed that as an American citizen that Japan could force an American citizen into the army and there wasn't anything that you could do about it, is that right?

quired to believe petitioner [R. 74] and that it was entitled to find the facts to be exactly contrary to the evidence, because the witness, petitioner, was interested in the outcome of the case [R. 73]. The trial court, this Court's decision in *Mandoli v. Acheson*, 344 U. S. 133 and the Italian military service cases cited in footnote 19, *supra*, to the contrary notwithstanding, said, when petitioner testified he was afraid of the Kempei Tei, "how ridiculous for me to believe his story." [R. 55.][26] This element of the case bears close resemblance to the trial court's view in *Gonzales v. Landon*. There, too, the trial court said [R. 32 of Record in *Gonzales v. Landon*, No. 111, Oct. Term, 1955 before this Court]: "I don't believe his testimony" and "I don't see how such foolish statements can be made." [*Ibid*, p. 33.]

But this facile view of the evidence is not permitted even in an ordinary case, let alone an expatriation case. The court below overlooked not only this court's admonition in the *Baumgartner* case, but even the rule in ordinary cases.

In *United States ex rel. Schachter v. Curran*, 4 F. 2d 356, 358 (C. C. A. 3, 1925), the court approved Judge Hand's statement that:

> "It is not enough for the Board of Special Inquiry to say that they do not believe. . . . They have no power to dispense with the usual means of ascertaining the truth."

In 31 C. J. S. Evidence, Sec. 104, p. 711, note 79, the rule is put:

> "Falsity of opponents testimony does not prove what is true, and disbelief does not supply need of proof."

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[26]The trial court also said [R. 56]: "If it were a plot in the wildest sort of a television story it couldn't be believed, couldn't be accredited by anyone seeking the truth."

In the light of this Court's decision in the *Mandoli* case and the many Italian military service cases cited in footnote 19, *supra*, as well as in the light of the many trial court cases which have passed upon cases involving military service in Japan[27] (see also Appendix herein and documents lodged with the clerk of this Court), it cannot be said that petitioner's testimony was inherently improbable, nor can it be claimed that there were in it inconsistencies or that facts contradict it. Therefore, even aside from the error of supplying facts contrary to it, the testimony cannot be disregarded merely because given by an interested party (*Chesapeake & Ohio Ry. Co. v. Martin*, 283 U. S. 209, 215-216; *Pence v. United States*, 316 U. S. 332, 339-340.)

Absent some reason to the contrary, apparent on the record (deductions from evidence cannot be arbitrary (*Flynn ex rel. Vee Suey v. Ward*, 104 F. 2d 900, 902 [C. C. A. 1, 1939]) these principles control: A witness is presumed to speak the truth (Cal. Code Civ. Proc., Sec. 1847); it cannot be assumed that a witness, even a party, answers dishonestly (*Hickman v. Taylor*, 329 U. S. 495, 509).

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[27] *E. g., Ishikawa v. Dulles*, 85 F. Supp. 1 (D. C. Haw., 1949); *Kato v. Acheson*, 94 F. Supp. 415 (D. C. S. D. Cal., 1950); *Moriizumi v. Acheson*, 101 F. Supp. 976 (D. C. N. D. Cal., 1951); *Murata v. Dulles*, 111 F. Supp. 300 (D. C. Haw., 1953); *Yoshida v. Dulles*, 116 F. Supp. 618 (D. C. Haw., 1954); *Serizawa v. Dulles*, 134 F. Supp. 713 (D. C. N. D. Cal., 1955); *Okada v. Dulles*, 134 F. Supp. 183 (D. C. N. D. Cal., 1955); *Namba v. Dulles*, 134 F. Supp. 633 (D. C. N. D. Cal., 1955); *Shibata v. Acheson*, 86 F. Supp. 1 (D. C. Haw., 1949); *Kanno v. Acheson*, 92 F. Supp. 183 (D. C. S. D. Cal., 1950); *Ozasa v. Acheson*, 94 F. Supp. 436 (D. C. S. D. Cal., 1950); *Okimura v. Acheson*, 111 F. Supp. 303 (D. C. Haw., 1953); *Terada v. Dulles*, 121 F. Supp. 6 (D. C. Haw., 1954).

It is not clear as to just what part of petitioner's testimony the trial court did not "believe". It will be recalled that all the evidence in the case, both oral and documentary, was adduced by petitioner. The trial court accepted at least a part of petitioner's testimony. Thus the trial court believed petitioner when he testified (1) that he was born in the United States [R. 10]; (2) that he claimed permanent residence in Los Angeles (*ibid.*); (3) that he went to Japan in August 1939 [R. 11]; (4) that he was drafted into the Japanese Army [R. 24, 56];[28] (5) that he applied at the American Consulate at Yokohama for an American passport to return to the United States but was denied on the ground that he had expatriated himself [R. 12].

What, then, was it that the court did not believe? During its oral opinion, the court said, [R. 55-56]:

> "How ridiculous for me to believe his story that in the summer of 1940, when he was notified to report, that for a year he didn't do anything to leave Japan and didn't make any effort to leave Japan. . . ."

As the *Lehmann* case has made clear (and it is noted that the government did not even seek review) the view of the law suggested by this statement is erroneous. And as this Court has made clear in *Mandoli*, there is no requirement that petitioner leave or try to leave the country. Indeed, in *Monaco*, the appellant there, not only did not leave Italy, but actually went there after having been warned by the State Department that he would be subject to

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[28]The court admitted into evidence [R. 24] the stipulation as to the Japanese military law which showed that a violation of a conscription order was a crime, punishable by imprisonment [R. 23]

military service and not to go without making sure that he could enter Italy without such liability. But more than that—what did the trial court mean? Was it suggesting, contrary to the evidence, that petitioner did try to leave Japan? Certainly this cannot be so because in its findings [V; R. 11] it found that petitioner made no effort to return to the United States. What, then, did the trial court disbelieve? That there was a Kempei Tei in Japan [R. 37, 49]? That petitioner feared what the Kempei Tei might do if he failed to obey the law [R. 37, 49]? That the military controlled the Japanese government and that even high officials were killed in their homes [R. 37]? No answer to these questions is apparent.

But the trial court did more than simply disbelieve petitioner as to some part of his testimony. The court actually and affirmatively supplied evidence, none of which is in the record, and some of which is directly contrary thereto. Thus the trial court said [R. 58]:

"He knew he was going to be drafted."

This view of the evidence the court incorporated in its formal findings [III; R. 11]. But the evidence is just to the contrary as seen from this question and answer on cross-examination [R. 25]:

"Q. And you knew, did you not, Mr. Nishikawa, that if you went to Japan you were likely to be drafted in the Japanese army; is that correct?

". . .

"The Witness: No, sir."

Even if, despite that there was no reason, this answer was not believed, it furnishes no basis, there being no other

evidence on the matter in the case, for affirmatively finding the contrary as the fact.

Admittedly, there is law to the effect that a trial court is not bound, under all circumstances, to accept the uncontradicted testimony of a witness. (*Quock Ting v. United States*, 140 U. S. 417, 420, 35 L. Ed. 501, 502.) But the decision not to so credit the witness must be a judicial, not an arbitrary, one, and, unless there is some inherent improbability, or contradiction, or omission or some other substantial reason for doubting the witness' sincerity, the general rule that the court is bound by the uncontradicted testimony, must prevail. (*Ibid.*) There is none of these exceptional circumstances here. Moreover, not only is there no contradiction of petitioner's testimony, but there is actual corroboration in the record in the form of the Japanese Military Service Law [R. 22-23]. Add to this the facts, of which judicial notice may be taken (see footnotes 6 and 20, *supra*), even if there were a balance, the weight is thrown overwhelmingly in favor of petitioner. Certainly the record here does not justify the court in supplying facts which are not there.

The gravamen of the court's error in finding the ultimate fact [III, R. 12] that petitioner's entry and service in the Japanese Armed Forces was his free and voluntary act, is not that the trial court did not believe petitioner, but rather the court's erroneous view of the law as to what is required of a dual national in order to avoid expatriation, coupled with an erroneous view as to what he could do. The theme of "sins of omissions" runs clear through the trial court's oral opinion. Thus, in distinguishing this case from a Nisei who had gone to Japan when he was very young, the court said [R. 55]: "Of course, there wasn't anything he (such a Nisei) could

do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail." Thus intimating that if petitioner did not go into the service he would not go to jail, and that there was a duty to risk same in any event. Again, the court said [R. 56]: "He just refrained from protecting his rights as a citizen" and *therefore*, "(H)is service could not be considered involuntary" [R. 57]. Aside from the fact that this demonstrates the court's erroneous view of the law as to where lies the burden of proof on the voluntariness issues (discussed above) these excerpts also demonstrate an erroneous view as to the duty of a dual national, in order to avoid expatriation, to fail to omit, but to do. (*Mandoli v. Acheson*, 344 U. S. 133; *Lehmann v. Acheson*, 206 F. 2d 592 (C. A. 3, 1953).)

Despite the circumstances under which petitioner was drafted, the decision below violates the rule that "The law does not exact a crown of martyrdom as a condition of retaining citizenship." (*Acheson v. Maenza*, 202 F. 2d 453, 459 (C. A. D. C., 1954).) The courts have rejected "the adoption of a Spartan standard by which to determine whether the appellant acted voluntarily." (*Mendelsohn v. Dulles*, 207 F. 2d 37, 39 (C. A. D. C., 1953).) To paraphrase *Podea v. Acheson*, 179 F. 2d 306, 309 (C. A. 2, 1950), petitioner "never voluntarily expatriated himself . . . by serving in the (Japanese) army. (This) step (was) required by the situation in which he found himself. . . ."

The conclusion of the trial court that petitioner went to Japan wanting to get into the Japanese Army [R. 56] is just contrary to that urged (successfully) by the Government in *Kawakita v. United States*, 343 U. S. 717, where the shoe was on the other foot and the Government

won out in contending in a treason case that petitioner did not lose his United States citizenship, but where petitioner there, also went to Japan during a time of "cold" war between Japan and the United States [R. 46]. See also, *Yoshida v. Dulles*, 116 F. Supp. 618, 620 (D. C. Haw., 1954), where plaintiff there went at a time (April, 1941) when the war was even "colder" or "hotter", depending upon one's view of those terms.

Upon a view of the whole case, we submit, the trial court's finding that petitioner acted voluntarily is "clear error". (*Baumgartner v. United States*, 322 U. S. 665, 672.) This is a case where, rather than construing the facts as far as reasonable in favor of the citizen (*Schneiderman v. United States*, 320 U. S. 118, 122), the courts below did just the opposite, and by piling non-existing inference upon non-existing inference construed the facts against the citizen.

At least, and even if, somehow, it is claimed that there is evidence in the record to support the finding of voluntary conduct, nevertheless the finding is clearly erroneous and the principle of *United States v. United States Gypsum Co.*, 333 U. S. 365 applies. This Court there said (333 at 395):

> ". . . a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This is particularly true in this kind of a case in light of this Court's ruling in *Gonzales v. Landon*, 350 U. S. 920.

II.

8 U. S. C. 801(c) Should Not Be Construed to Apply to the Facts of This Case.

It is axiomatic that statutes are to be construed, if at all possible, to avoid passing upon grave constitutional questions. (*United States v. C.I.O.*, 335 U. S. 106.) Such is especially the case here. "There is another reason for reading the section narrowly. When we deal with citizenship we tread on sensitive ground." (*United States v. Minker*, 350 U. S. 179, 197, Mr. Justice Douglas, concurring.)

The circumstances under which petitioner served in the Japanese Army are that he was a dual citizen of that country and this, and was drafted pursuant to the law of Japan in which he was at the time residing. In other words, he obeyed the law of the country in which he found himself and of which he was a citizen. By virtue of the principles set forth in the cases discussed below, both by way of persuasive, if not, indeed, actually binding, precedent, and in order to avoid meeting the constitutional question, the section should not be interpreted to compel expatriation.

In *Kawakita v. United States*, 343 U. S. 717, 723, 725, this Court said:

> ". . . He (Kawakita) had a dual nationality, a status long recognized in the law. . . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilties of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. . . .

"As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other. . . ."

In its Brief in Opposition in that case (No. 220 Misc., Oct. Term, 1951) the Government said (pp. 11-12):

". . . the country of residence can force such a national to serve in its armed forces. . . . *Petitioner was unequivocally excused for conduct required of him by the laws of Japan.*" (Italics added.)

Lehmann v. Acheson, 206 F. 2d 592, 598 (C.A. 3, 1953), involved conscription into the Swiss Army of an American citizen who also had Swiss citizenship. Said the court, after setting out the quotation from *Kawakita*, *supra*:

"Lehmann's actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which would possibly justify a finding that Lehmann did aught but what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland. . . ."

In *Okimura v. Acheson*, 111 F. Supp. 303, 305 (D.C. Haw., 1953), the court, again after referring to *Kawakita*, said:

". . . Being a citizen of Japan as well as of the United States, but living in Japan, the plaintiff was subject to and under compulsion and obligation to comply with the Japanese laws. His complying with the Japanese conscription law and voting in the gen-

eral elections of Japan were acts commensurate with those of Japanese citizens living in Japan. Without more, these acts cannot amount to renunciation of United States citizenship acquired by reason of birth."

Orfield, in his article "The Legal Effects of Dual Nationality", 17 Geo. Wash. L. R. 427, 429, 431, says:

"In practice, however, it is the presence of the individual who remains or resides within its territory, which justifies a state claiming him as a national, though another state also claims him, in exacting from him the performance of duties that ordinarily may be demanded of a national. (Citing 2 Hyde, International Law (2d ed. 1945) p. 1113; Hanna, *Nationality and War Claims* (1945), 45 Cal. L. Rev. 301, 308-309). This is true of both adults and minors. The other state should not and does not interfere with the first state's claim to him. With respect to physical control over his body only the state of his residence may reach him.

". . . He (a person with dual nationality) is not entitled to protection by one of the two states of which he is a national while in the territorial jurisdiction of the other. (Citing Article 4 of the 1930 Hague Convention on Conflict of Nationality Laws.) Either state not at war with the other may insist on military service when the person is present within its territory. . . .

". . . When a person of dual nationality resides in one of the states of his nationality, the other will not generally espouse a claim on his behalf against the country of his residence." (Citing: The *Canevaro Case* (1912); Scott, Hague Court Reports 284 1916); *United States (Alexander Tellech) v. Austria and Hungary*, Tripartitite Claims Commission, Decisions and Opinions (1929) p. 71.)

In his opinion of May 8, 1951 (41 Ops. Atty. Gen. No. 16), called to the attention of this Court in *Mandoli v. Acheson*, 344 U. S. 133, the Attorney General said in ruling that there was no expatriation:

> ". . . He served in the Italian army only for the minimum time required by law, and he does not appear to have done anything savoring of allegiance to Italy beyond what he was compelled to do. . . ."

These cases, statements and reasonings, together with this Court's decision in *Mandoli v. Acheson*, 344 U. S. 133, demonstrate that merely obeying the law of a country in which one resides, at least when coupled with the fact that the person has the citizenship of that country, does not amount to expatriation from the citizenship of the country in which he is not present at the moment. To hold otherwise—to hold that dual nationality does exist, but at the same time to hold that the exercise of that dual nationality imposes loss of it—is arbitrary and unreasonable, and hence, we submit, a denial of due process under the Fifth Amendment.

We have previously called to the attention of this Court the case of *Takeguma v. United States*, 156 F. 2d 437 (C. C. A. 9, 1946), wherein the court held that even a person who had expatriated himself from United States citizenship under 8 U. S. C. 801(i) was not excused from the draft laws of this country. How, then, is it commensurate with due process—with our orderly concept of justice—to interpret Section 401(c) so as to impose loss of citizenship in the instant case?[29] It is incongruous for

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[29] *Cf.* Universal Declaration of Human Rights, Art. 15(2) (35 A. B. A. J. L. 32, 33): "No one shall be arbitrarily deprived of his nationality nor denied the right of change of nationality."

us in this country to compel military service of aliens, but yet to say when another country does the same thing, involuntary expatriation is imposed. The statute should not be thus interpreted.[39]

If petitioner's arguments thus far are not accepted, then the constitutional issue is squarely presented, and the question is whether Congress has the power, under the Fifth and Fourteenth Amendments, to impose loss of citizenship on a native-born citizen, against his will and consent and without his knowledge of the consequences of his acts.

III.

8 U. S. C. 801(c) Is Unconstitutional on Its Face and as Applied.

(1)

Preliminary Statement.

The bald and undenied effect of the compulsory imposition of loss of citizenship under the section is that Congress is taking away that which the Constitution has given.

Unlike the power of Congress, pursuant to Article I, Section 8, Clause 4, to condition the grant of naturalization (*cf. Lapides v. Clark*, 176 F. 2d 619, cert. den. 338 U. S. 860, reh. den. 338 U. S. 888, Congress has no such power, absent consent, to take away that which the Constitution grants a native-born citizen.

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[39] *Cf.* 25 So. Cal. L. Rev. 196, 199 (commenting on and approving *Okimura v. Acheson*, 99 Fed. Supp. 587 (D. C. D. Haw., 195):

> "If aliens may serve in the United States Army . . . and yet remain aliens, it does not appear reasonable for Congress to say that American nationals may not do so in a foreign country without constructively intending to lose their nationality."

Petitioner is a citizen of the United States, not by grace of Congress, nor by its Act. He is a citizen by virtue of the United States Constitution (Fourteenth Amendment). A constitutional right which the *Constitution* and not *Congress* grants him, may not be taken away from him involuntarily. Article VI, Section 2 of the Constitution provides that "(t)his Constitution and the laws of the United States made in pursuance thereof . . . (are) the supreme law of the land." It can scarcely be said that a law which takes *away* citizenship which has been *granted* by the Constitution is a law made *in pursuance* of that Constitution. On the contrary, such an act is in direct derogation thereof.

In *Dos Reis v. Nicolls*, 161 F. 2d 800 (C. C. A. 1, 1947), the court discusses the constitutional problem here involved (161 F. 2d at 802) and expresses doubt as to the validity of such legislation, but does not reach the question because it construed the section in such a way as to avoid it. However, that court did recognize that expatriation cannot be effected unless the act performed or condition entered into is performed voluntarily "with notice of the consequences." And that court quoted from *Mackenzie v. Hare*, 239 U. S. 299, 311, that

> "a change in citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen."

Holding directly that *Congress* has no authority to destroy, diminish, or dilute the *United States citizenship conferred by the Fourteenth Amendment to the Constitution of the United States*, is *United States v. Wong Kim*

Ark. 169 U. S. 649. In that case the Court declared (at p. 703):

> "... *The power of naturalization, vested in Congress* by the Constitution, *is a power to confer citizenship*, not a power to take it away." (Italics added.)

See the recent article by Professor Hurst, "Can Congress Take Away Citizenship," 29 Rocky Mount. L. Rev. 62, in which he holds that Congress can not so do.

(2)

THE RIGHT OF EXPATRIATION IS NOT TO BE EQUATED WITH THE PENALTY OF EXPATRIATION.

It is clear that a United States citizen may not renounce his citizenship without the consent of the Sovereign.

In *Shanks v. Dupont*, 3 Pet. (U. S.) 242, 246, this court said:

> "The general doctrine is, that no persons can, by any act of their own, *without the consent of the government*, put off their allegiance and become aliens." (Italics added.)

Accord:

> *Murray, v. The Schooner Charming Betsy*, 2 Cranch. (U. S.) 64; 120.

Cf. Dawson's Lessee v. Godfrey, 4 Cranch. (U. S.) 321, 323:

> "(A) man can never put off his allegiance, or be deprived of the benefits of it but for a crime."

This is consistent with what the text writers have said on the subject.

In Getty's *The Law of Citizenship in the United States* (Univ. of Chicago Press, 1934), at page 160, this explanation is made:

> ". . . The right of an individual to terminate has native allegiance without the consent of his native country has been the subject of prolonged controversy and disagreement among the states of the world. International law recognizes that each state decides for itself whether or not expatriation is permissible. At present there seems to be no agreement as to the existence of a 'right of expatriation.' Some states have indicated a recognition of the doctrine of voluntary expatriation under certain conditions, as specified in bilateral treaties. Other states recognize the right unconditionally, while still others do not permit the expatriation of their citizens except by special consent . . ."

Dutcher in his article, *The Right of Expatriation,* 11 A. L. R. 447, 474, exhaustively reviews the subject and says:

> "The whole body of Federal law . . . announces with greater or less distinctness that a citizen of the United States cannot absolve himself from his allegiance thereto without some law of the United States permitting him so to do. Nor does the act of 1868 change the rule."

Swift, *A System of the Laws of the State of Connecticut* (Windham, Conn., 1795-96, Vol. I, p. 164), says:

> "Natural allegiance is the perpetual obligation to government binding on all mankind. It is a duty which they owe and which they can never renounce and disclaim, *without the consent and concurrence of the supreme power of the state.*" (Italics added.)

Blackstone put it this way:

> "Allegiance is the tie, or *ligamen*, which binds the subject to the King, in return for that protection which the King affords the subject . . . .
>
> ". . . (T)his natural *allegiance* . . . . *cannot be divested without the concurrent act of that prince to whom it was first due.*" (Second italics added.) (1 Blackstone, Commentaries, 367 *et seq.*)

Hence, it became necessary for Congress in 1868 to pass legislation giving such consent. And it did so, in eloquent language. (R. S. 1999; 8 U. S. C. (1946 Ed.) 800.) But even today (8 U. S. C. 1483), Congress has withheld consent to expatriation in certain cases. (*Cf. In re Grant*, 289 Fed. 814 (D. C. S. D. Cal., 1923; *United States v. Kuzcabara*, 56 F. Supp. 716 (D. C. N. D. Cal., 1944).)

One of the most recent examples of the necessity for governmental consent before a citizen can throw off the mantle of citizenship occurred also during World War II when Congress enacted 8 U. S. C. 801(i) (c. 368, Sec. 1, 58 Stat. 677) (now 8 U. S. C. 1481(a)(7)) with reference to the American-born Japanese who had been evacuated from the Pacific Coast and were held in camps by the United States Government. An account of this is set out in *Acheson v. Murakami*, 176 F. 2d 953, 962 (C. C. A. 9, 1949). (Finding 19).

Also demonstrating the necessity for the consent of the sovereign is *Kawakita v. United States*, 343 U. S. 717 where, in defense to a charge of treason, the defendant contended that he had exercised his "natural and inherent right" to expatriate. This contention was rejected.

If, then, a citizen cannot expatriate himself without the consent of the sovereign, the Sovereign cannot, especially because of the constitutional root of native born American citizenship, yank off the mantle from the citizen without his consent, voluntarily entered into with notice of the consequences. United States citizenship is a two-way highway, not a one-way street. Neither the Government may impose its loss nor may the citizen shed it without consent of the other. This is not new doctrine. As seen, it was recognized as early as Blackstone's time. And see Chief Justice Parsons in *Ainslee v. Martin*, 9 Mass. 454 (1813):

> "Protection and allegiance are reciprocal. The sovereign cannot refuse his protection to any subject, *nor discharge him from his allegiance against his consent*; and he will remain a subject, unless disfranchised as a punishment for some crime." (Italics added.)

It is, of course, accepted law that a person may give up, or "waive" constitutional rights. We concede that the right of citizenship granted and guaranteed by the Fourteenth Amendment would be among those constitutional rights which could be waived.[31] Else, 8 U. S. C. 800 would be meaningless. But it is equally accepted law that such waivers are not to be lightly implied and that before a waiver will be decreed, there must be the exercise of a free and intelligent choice[32] of at least the magnitude that is required, for example, for a waiver

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[31] "Expatriation is the voluntary *renunciation or abandonment* of nationality and allegiance." *Perkins v. Elg*, 307 U. S. 325, 334. (Italics added.)

[32] *Cf.* the same rule even when one is *applying* for citizenship. *Moser v. United States*, 341 U. S. 41.

of the right of counsel,[33] or the right to a jury trial,[34] or the right to freedom from unreasonable search and seizure,[35] or the privilege against self-incrimination.[36] Were it otherwise, Congress would then be taking away *without the consent of the citizen* a right guaranteed him by the Constitution. Congress can no more do this in regard to citizenship than it can say that a man waives the right to counsel because he voluntarily pleads guilty when he does not know of the right to counsel in the first place (*Rice v. Olson*, 324 U. S. 786).

In other words, because Congress had the right to and did recognize the right of a citizen to give up his citizenship when he *wanted* so to do, *i.e.*, recognized the "right of expatriation," it had no power to twist that right into a liability and *impose* expatriation where the citizen did not want to give up his birthright.

(3)

CONGRESS HAS HERE EXCEEDED ITS POWER.

Similar legislation (8 U. S. C. 801(e)) to and that involved here was declared unconstitutional by the United States District Court for the District of Hawaii in *Okimura v. Acheson*, 99 F. Supp. 587 and *Murata v. Acheson*, 99 F. Supp. 591. Direct appeals were taken to this Court by the Government. This Court did not pass

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[33] *Johnson v. Zerbst*, 304 U. S. 459, 464; *Glasser v. United States*, 315 U. S. 60, 70; *Gibbs v. Burke*, 337 U. S. 773, 780; *Uveges v. Pa.*, 335 U. S. 437, 441.

[34] *Patton v. United States*, 281 U. S. 276, 312; *Hodges v. Easton*, 106 U. S. 408; *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 393.

[35] *Johnson v. United States*, 333 U. S. 10, 13; *Amos v. United States*, 255 U. S. 313; *United States v. Di Re*, 332 U. S. 581.

[36] *Smith v. United States*, 337 U. S. 137, 150; *Quinn v. United States*, 349 U. S. 155.

on the issue but remanded the cases to the District Court for specific findings as to the circumstances attending the military service and voting involved (342 U. S. 899 and 900). On remand, the court made the required findings and still held the sections unconstitutional (*Okimura v. Acheson*, 111 F. Supp. 303; *Murata v. Acheson*, 111 F. Supp. 306). That court adhered to these decisions in six later cases.[87] The Government pursued appeals in none of these cases. In the light of this fact, the *Okimura* and *Murata* cases take on additional stature.

In the second *Okimura* case (111 F. Supp. 303), the court pointed out that it adhered to the rationale presented in the first case (99 F. Supp. 587). In that first case the court had said (99 F. Supp. at 589, 590):

> "May Congress divest a native born citizen of his birthright?
>
> ". . .
>
> "The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. . . .
>
> ". . .
>
> "Too, it may be granted that a native citizen may lost that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.
>
> "Our concern is, rather, where in the Constitution is to be found any grant of power—specific or rea-

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[87] *Terada v. Dulles*, 121 F. Supp. 6; *Uesu v. Dulles*, No. 1251; *Kikkawa v. Dulles*, No. 1256; *Hisamoto v. Dulles*, No. 1318; *Tamada v. Dulles*, 1263 and *Imaeda v. Dulles*, No. 1240 (the latter holding § 801(d) also invalid).

sonably implied by which Congress is authorized to divest an American born citizen of his nationality, because, having also Japanese nationality, he served in the Japanese Army or voted in an election in Japan? ____.

"It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

"The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seems to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

". . . .

"Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation; yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.

"Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but is wholly devoid of any power to destroy cititzenship by birth."[38]

[38] By footnote 14, p. 500, the court made this significant statement:

"This Court is aware that there have been authoritative intimations to the contrary. See Mackenzie v. Hare, 239 U. S. 299, 311, 312, 36 S. Ct. 106, 60 L. Ed. 297; Perkins v. Elg, 307 U. S. 325, 329, 59 S. Ct. 884, 83 L. Ed. 1320; and Kawakita v. United States, 9 Cir., 1951, 190 F. 2d 506. But only in the Mackenzie case was the precise Constitutional question here involved squarely presented, and there under vastly different facts."

We submit that this reasoning represents the correct law. We have previously called attention to the *Wong Kim Ark* case where this Court said (169 U. S. at 703):

> "The 14th Amendment, while it leaves the power of Congress where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right of citizenship."

Moreover, a comparison between the language of the Constitution and the statute in question immediately demonstrates the patent invalidity of 8 U. S. C. 801(e). Thus:

U. S. Constitution 14th Amendment	*8 U. S. C. 801*
"All persons born or naturalized in the United States . . . are citizens of the United States. . . ."	"A person who is a national of the United States shall lose his nationality by . . ."

Nor does the declaration of Congress in 8 U. S. C. 800 change the situation. Regardless of what may be the rule where an American citizen actually *renounces* his citizenship, there is no basis for saying that Congress has the right to deprive him of his citizenship by the doing of acts other than actual renunciation, simply because Congress does not like him. The Constitution gives Congress no such right; that body cannot, by a declaration, clothe itself with such power.

The attempt by Congress to say that a person as to whom the Constitution says is a citizen, is not a citizen, is no more valid than would be efforts by Congress to undo any other provision of the Constitution. A few

examples, by way of rhetorical questions, will demonstrate the lack of power in Congress to so do:

1. Article I, Section 1, says that Congress shall consist of a Senate and a House of Representatives. May Congress decree that hereafter Congress shall consist of only a Senate?

2. Article I, Section 2, subsection 1, provides that members of the House of Representatives shall be chosen every second year. May Congress provide that hereafter members of the House shall be elected every third year?

3. Article I, Section 2, subsection 4, provides that where there is a vacancy in the House of Representatives from any state, the executive of that state shall fill the vacancy. May Congress provide that in such an instance the executive of that state shall not have the right but that Congress itself shall fill the vacancy?

4. Article I, Section 3, subsection 6, provides that the Senate shall have the sole power to try all impeachments. May Congress provide that the power to try impeachments shall henceforth be given to the House?

5. Article I, Section 3, subsection 7, provides that the judgment in impeachment shall extend only to removal from office and disqualification. May Congress enact that a judgment of impeachment may provide for sending the officer to jail?

6. Article I, Section 6, subsection 1, provides that a Senator or Representative for a speech or debate in either house shall not be questioned in any other place. May Congress provide that a Representative could be called to answer for a speech in the House before a Federal Grand Jury?

7. Article II, Section 1, subsection 1, provides that the President shall hold office for four years. May Congress provide that henceforth he shall only hold office for three years?

8. Article II, Section 2, Clause 1, provides, *inter alia*, that the President shall be the Commander-in-Chief of the Army and Navy, and that he shall have the power to grant pardons save in cases of impeachment. May Congress provide that he shall lose his command or his power to pardon if he engages in acts of which Congress disapproves?

9. Article III, Section 1, provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may establish. May Congress provide that the Supreme Court shall no longer have judicial power if it acts in a manner displeasing to Congress?

10. Article III, Section 3, Clause 1, provides that Congress may admit new states to the Union. May Congress provide that a state once admitted into the union can be ousted therefrom?

11. Article VI, Section 3, provides that no religious test shall be required as a qualification for an office of public trust. May Congress provide that such a qualification be required?

12. The Third Amendment provides that no soldier shall, in time of peace, be quartered in any house without the consent of the owner. May Congress provide that, in time of peace, soldiers may be quartered in a house without the owner's consent?

13. The Seventeenth Amendment provides that each state shall have two Senators. May Congress provide that a particular bad acting state shall have one or no Senators?

Further examples could, of course, be cited. The point is that citizenship is a specific right which the Constitution and not Congress gives. How, then, can Congress undo what the Constitution does?

Moreover, if Congress can strip away citizenship from persons constitutionally endowed with that status, why cannot it by similar legislation take away lesser rights which go to make up that bundle which we call American Citizenship, such as: the right by trial by jury, to be represented by counsel, to freedom of speech, etc. A familiar maxim is that the greater includes the lesser. Therefore, if Congress can take away the whole of citizenship, it should logically follow that it can take away any part thereof.[39] We believe Congress has no power in either instance.

We submit that in enacting "provisions for *compulsory* expatriation"[40] (italics added) absent consent, Congress has exceeded its delegated powers.

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[39] The fact that these rights may also belong to aliens does not detract from the point. They certainly belong to citizens. See *Galvan v. Press*, 347 U. S. 522, for an example of where aliens have, if anything, less rights than citizens.

[40] The self contradicting words are those of the Government in its brief (p. 49) before this Court in the *Gonzales* case.

Conclusion.

The judgment of the court below should be reversed and petitioner declared to be a national and citizen of the United States.

Respectfully submitted,

A. L. Wirin,

Fred Okrand,

Attorneys for Petitioner.

APPENDIX.

Extracts From and or Comments on Documents Lodged With the Clerk of This Court in Aid of the Court's Taking Judicial Notice of Conditions in Japan at the Time Involved in This Case.

"For a long time the average citizen's reaction to the police has been one of extreme fear." (SCAP, *Summation No. 3*, Dec. 1945.)

"Free thought and free expression have been practically unknown in Japan. The police have occupied a dominant control over all phases of Japanese life. In addition to the regular police employed in maintaining law and order, Japan had an extensive network of secret police (Kempei Tei) and 'thought police.' The former possessed army authority and the latter authority of the Peace Preservation Act of 1941 and similar enactment on 'thought control.' Together they had been given unlimited power to deal with any signs of unrest or dissatisfaction. Thus the emergence (end of p. 36) of democratic groups was subjected immediately to ruthless terrorization and brutality. The press and radio have served as the mouthpiece of government policy." (SCAP, *Summation No. 1*, Sept., Oct., 1946, pp. 36-37.)

"Free thought and speech were completely suppressed by the special types of Japanese police. Ruthless methods prevented the emergence of authentic democratic groups." (*Ibid.*: 33.)

"The Japanese theatre was in a condition of stagnation. Expression of new ideas was not permitted and plays were either propagandistic or escapist in nature. Troupes touring the Country presented nothing but obviously official materials.". (*Ibid.*, 148.)

"In the course of 20 years, Japanese militarists had constructed effective machinery for controlling the speech, thoughts, and movements of the people. This was accomplished through legislation, the police, censorship regulations, centralized control over newsprint and ownership of radio broadcasting facilities." (*Ibid.*, 163.)

"In the later years, preceding and during the war, the most vicious regimentation of the people came through the police force of Japan, which was also under the Home Ministry. By both legal and extra-legal methods the police eliminated dissident elements, frequently throwing people in jail who were considered troublesome and keeping them there for years without lodging specific charges." (SCAP, *Two Years of Occupation*, p. 14.)

"Most objectionable of these were, of course, the supervision and restriction of the people in the exercise of their fundamental rights under the so-called Peace Preservation Law. For this purpose there were 'Thought Police' or 'Special Higher Police' units in the municipalities, prefectures and in the Home Ministry. The activities of these bodies were supplemented by the 'Protection and Surveillance Commission' and 'Protection and Surveillance Stations' in the procuratorial system under the Ministry of Justice." (SCAP, *A Brief Progress Report on the Political Reorientation of Japan*, p. 7.)

"(Nisei, whether in Japan or long or short time) were under surveillance (by the police) by reason of their identity and association." (Togosaki Deposition, p. 10.)

"Conscription or government notification is final to which no one can appeal. There is no process, no media, no channel by which an appeal can be made." (*Ibid.*, pp. 26-27.)

"There was fear . . among (the draftees) that they would be shot or killed . . . if they didn't obey summons." (*Ibid.*, p. 27.)

The court below commented on several features from the Murayama deposition in *Fukumoto v. Dulles*, 216 F. 2d at 555.

After the Manchurian incident, no one refused military conscription. (Matsuki Deposition, pp. 15, 17.) One couldn't refuse conscription. (*Ibid.* pp. 18, 21.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~415~~ 19

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 415

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

Comments Upon Respondent's Introductory Argument (Resp. Br. 14-21.)

Contrary to respondent's suggestion (Resp. Br. 15), it is *not* common ground between the parties that (Resp. Br. 16) "it is immaterial that the petitioner may not have known that his entering the Japanese army would result in his expatriation." If, as we believe the law to be (*Perkins v. Elg*, 307 U. S. 325, 334), that "expatriation is the voluntary *renunciation* or *abandonment* of nationality and allegiance," then, we submit, it becomes highly material as to whether petitioner knew his entry into the Japanese army would result in expatriation. From the

standpoint of the Government, if it could show that petitioner *knew* his Japanese military service would result in expatriation, we have no doubt it would strenuously argue that this showed an intention to renounce or abandon United States nationality; at least it would so argue on the issue of voluntary conduct. Conversely, we submit, it is likewise material, from the standpoint of petitioner's case that he did not know such service would result in expatriation.[1]

Savorgnan v. United States, 338 U. S. 491, cited by respondent (Resp. Br. 16) is not to the contrary. That was a case of *taking on* allegiance to a foreign country *and* actually *renouncing American citizenship* (see page 495, fn. 3),[2] thus coming within this court's definition of what expatriation is (*Perkins v. Elg, supra*). It is true that Mrs. Savorgnan claimed (338 U. S. at 499) she did not intend to give up American citizenship (although she conceded (*ibid.*) that she intended to and did volun-

[1]There is no contention by respondent that petitioner knew he would lose his American citizenship by reason of his Japanese army service. Indeed the trial court conceded [R. 57] that petitioner did not so know. In this connection, it should be pointed out that the subsection in question did not even go into effect until January 12, 1941 (8 U.S.C. [1946 Ed.] 906) which was long after petitioner became subject to and was actually aware that he was subject to the Japanese military conscription law. It should also be pointed out that the law itself was not passed until October 14, 1940 (54 Stat. 1168), likewise after plaintiff became, and was aware that he was subject to Japanese military service. Prior to January 12, 1941, there was no law expatriating a person who served in a foreign army.

[2]The instrument Mrs. Savorgnan signed said: "I, born an American citizen, declare I renounce and in truth do renounce my American citizenship

tarily apply for and accept Italian citizenship, but it is also true that this court's decision, fairly read, points to the contrary. Thus this court pointed out (338 U. S. at 502) that "she knew that the instruments related to her citizenship."[3] And this court further pointed out (*ibid.*) that Mrs. Savorgnan's husband understood Italian, and that "he was with her and able to translate and explain them (the documents she signed) to her when she signed them." Therefore, said this court (*ibid.*), she "was as responsible for understanding them as if they had been in English."

Accordingly, we do not think that this court was unfair to Mrs. Savorgnan when later, in *Moser v. United States*, 341 U. S. 41, 47, it distinguished, and properly so, the *Savorgnan* case and characterized Mrs. Savorgnan's actions and claim as simply "signing one thing and claiming another." (*Cf. McGrath v. Abo*, 186 F. 2d 706 (C. A. 9, 1951), cert. den. 342 U. S. 832.) To the extent that the dictum in *Savorgnan* stands for the proposition that intent is irrelevant in expatriation cases, considerable doubt has been cast thereon[4] by this court's decision in *Moser* as well as its decision in *Kawakita v. United States*, 343 U. S. 717, 727, where this court held that it was for the jury to determine whether petitioner there intended, by the various acts he performed, to

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[3] No such claim has or could be made in the case at bar.

[4] See "'Voluntary' A Concept in Expatriation Law," 51 Colum. L. Rev. 932, 944.

renounce his American citizenship. If, as contended by respondent here, intent is immaterial, the trial court in *Kawakita* in submitting the question to the jury, would clearly have been in error just as *Kawakita* claimed.

Respondent is likewise in error in his suggestion (Resp. Br., 18) that "there is universal agreement among the courts" that after the citizen establishes that he was born in the United States, the Government's burden in an expatriation case of going forward with the evidence is satisfied by showing the physical expatriating act itself, here, service in a foreign army. See, for example, *Brumi v. Dulles*, 235 F. 2d 855, where the Court of Appeals for the District of Columbia said (235 F. 2d at 856):

> ". . . . (W)hen an American citizen is said to have expatriated himself, by joining the armed services of Italy, for example . . . the *voluntary character of such acts must be proved* under the strict standards above referred to, ..." (Italics added) (the standards referred to are those set forth by this court in *Gonzales v. Landon*, 350 U. S. 920; *Schneiderman v. United States*, 320 U. S. 118, 125).

And compare *Lehmann v. Acheson*, 206 F. 2d 592, 598 (C. A. 3, 1953):

> "It was the District Court's view that Lehmann bore the burden of establishing that his service in the Swiss Army and his taking of an oath of allegiance to Switzerland were involuntary. In that respect the District Court erred."

II.

The Burden of Proving Expatriation, Including the Element of Voluntary Conduct, Is on the Government and the Government Has Failed to Sustain That Burden. (Reply to Respondent's Point I; Resp. Br. 20-50.)

A.

The Voluntary Nature of Petitioner's Military Service Is Part of the Government's Case Which It Must Prove; It Cannot Rely Upon a Presumption of Voluntary Conduct. (Reply to Respondent's Point I, A; Resp. Br. 21-24.)

We have pointed out above how clearly *Brumi v. Dulles*, 235 F. 2d 855, required the Government to prove the voluntary character of the act. Respondent's effort (Resp. Br. 22) to interpret *Lehmann v. Acheson*, 206 F. 2d 592, as standing for the proposition that the fact of service is presumptively voluntary on the theory of "implicit acknowledgment" that the citizen has the burden of showing du. ss is misplaced in the light of the court's direct statement (*supra*, p. 4) that the District Court erred in its view that the plaintiff had the burden of showing involuntariness.

In an expatriation case this is as it should be by reason of the fact that, by its very definition, expatria ion is voluntary conduct. In other words, voluntary action is one of the indispensable elements of expatriation, and there is no more reason for relieving the Government, whose burden it is, admittedly, to prove expatriation, of that element of its case, than it is to relieve it of the

burden of proving any other element. Respondent's analogy to the defense of insanity in a criminal case is not apposite because sanity or insanity is not an element of the crime. If criminal cases are to be looked at for analogy, more analogous would be the elements of intent or willfulness in those crimes which require same before a crime can be said to have been committed. Thus this court, in *Bollenbach v. United States*, 326 U. S. 607, held that the possession of stolen property in a state other than in which it was stolen, shortly after the theft, raises no presumption that the possessor was the thief and transported stolen property in interstate commerce. Again, in *Morisette v. United States*, 342 U. S. 246, this court held that the requisite criminal intent to steal or knowingly convert government property cannot be presumed merely because the defendant took it. This case is of added value because the statute in question (18 U. S. C. 641) did not contain within its words the requirement of intent. Nevertheless this court held that the mere omission from the statute of any mention of intent did not eliminate that element from the crimes denounced, and therefore must be proved.[5] Another example is *Holland v. United States*, 348 U. S. 121, in which, although finding that the element of wilfulness was adequately proved, this court approved the rule that in a prosecution for income tax evasion, the taxpayer's wilfulness is an element necessary for conviction and that such wilfulness involves a

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[5]In its brief (Pgs. 35, 36) the Government has pointed out that Congress refrained from inserting the word "voluntary" in the proposed subsections (b) through (g) of Section 401 of the 1940 Act. But the Government concedes (Resp. Br. 16, 36) that subsection (c) was intended to apply only if the conduct was voluntary. The analogy to the *Morisette* case is manifest.

specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income. See also, *Quinn v. United States*, 349 U. S. 155, 165, as to the necessity of proving intent in a prosecution for contempt.

Other examples could be suggested. The point is that voluntary conduct is an element of the act of expatriation without which such conduct there simply is no expatriation. It is not merely that involuntary conduct is a defense to expatriation.

Respondent is in error, we respectfully suggest, in his assertion (Resp. Br. p. 10, fn. 10), that *Gonzales v. Landon*, 350 U. S. 920 did not hold contrary to his position. Quite the converse is true. The Court of Appeals for the District of Columbia in *Brunt v. Dulles*, 235 F. 2d 855 correctly interpreted *Gonzales* in holding that the Government must prove the element of voluntary conduct by the same standards of proof as any other element of expatriation. As we pointed out in our Opening Brief (p. 15), the major thrust of petitioner Gonzales' argument to this court was not, as respondent suggests (Resp. Br. p. 24, fn. 10), that he did not remain outside the country in order to avoid military service, but rather that he did not do so voluntarily and that the Government's proof to show voluntary conduct did not rise to the standard required. The decision in the *Gonzales* case, we submit, sustained petitioner's contention.

B.

Military Service by Reason of Conscription Raises a Rebuttable Presumption of Involuntariness. (Reply to Respondent's Point I, B; Resp. Br. 25-33.)

Respondent is correct when he states (Resp. Br. 25) that petitioner, as a part of his case, did show that his military service was under compulsion of law, the compulsory Japanese Military Conscription Law. [R. 18, 22-23.] In a sense, therefore, respondent's discussion under his Point I, A is academic because inextricably bound up with plaintiff's evidence that he served in the Japanese army was the evidence that this service was not volunteered, but was under and pursuant to the compulsory law of that country which provided for criminal punishment for violation thereof.

The courts below in this case are alone in agreeing with respondent (Resp. Br. 25) that compulsory military service due to conscription does not create a rebuttable presumption of involuntary conduct.[6]

Petitioner does not quarrel with respondent's generalization (Resp. Br. 25, 26) that all the surrounding circumstances may be overlooked to in determining whether a call to arms was answered voluntarily or involuntarily. But this does not meet the point at issue, which is that once it is established that military service was due to conscription under a law which calls for punishment for violation thereof, a rebuttable presumption arises of involuntary conduct. If there are surrounding circum-

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[6]See Pet. Op. Br. p. 17, f. n. 15 for an explanation that the Circuit Court for the District of Columbia which decided *Mlota v. Dulles*, 221 F. 2d 52 and *Acheson v. Marenza*, 202 F. 2d 453, agrees with petitioner and not respondent.

stances, they may go to rebut the presumption, they do not take away the presumption itself. (See Pet. Op. Br. 16-20.)

In suggesting (Resp. Br. 27) that military service by reason of conscription "should be of neutral import," respondent is denying a very fundamental fact of life itself.[7]

We have previously suggested (Op. Br. p. 17, fn. 15) that the Court of Appeal for the District of Columbia, as a result of further consideration in later cases, no longer adheres to the language quoted by respondent (Resp. Br. 29) from *Acheson v. Maenza*, 202 F. 2d 453, 457-458.[8]

The quotation by respondent (Resp. Br. 27) from the trial court decision in *Hamamoto v. Dulles*, 98 Fed. Supp. 904, 905, adds nothing to respondent's arsenal, it being by the same judge which decided the instant case. The quotation does serve the purpose, however, of making clear, if indeed there were any doubt, the legal error into which the trial court fell in the instant case in refusing to recognize that conscription creates a rebuttable presumption of involuntary conduct. Aside from the inapositeness of comparing conscription in the United States with conscription in totalitarian Japan, the quotation shows that it was the trial court's view not only that no pre-

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[7] *cf. e. g.* The recent newspaper stories of Ted Williams' reaction at being called back into the service although he was a member of the Reserves and might well have anticipated such a call.

[8] Although on the merits the *Maenza* decision is contrary to the decision below and we have no doubt that petitioner's case here would have been reversed by the court which heard the *Maenza* case. (*cf. Saccodato v. Dulles*, 226 F. 2d 243; *Aleta v. Dulles*, 221 F. 2d 52.)

sumption of involuntary conduct is created by conscription, but that, *affirmatively*, response to a compulsory military service call is in and of itself voluntary.[9] *At the very least*, the quotation demonstrates that the trial court gave *no consideration* to the fact of conscription (*cf. Augello v. Dulles*, 220 F. 2d 344, 347), thus clearly not considering all the surrounding circumstances.[10]

It is to be noted that the *Hamamoto* doctrine was adopted and followed by the trial court in *Bruni v. Dulles*, 121 Fed. Supp. 601, but was rejected on appeal. (*Bruni v. Dulles*, 235 F. 2d 855 (C. A. D. C., 1956).)

Aside from respondent's disagreement (Resp. Br. 27, fn. 12) with *Lehmann v. Acheson*, 206 F. 2d 592, it is apparent that he considers as *proof* of voluntary conduct, the fact that petitioner did not try to break and disobey the law.[11] We submit that such logic in a case seeking to strip one of his citizenship does not comport with the standards required.

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[9]We do not understand the court's use of the words "without resistance." What kind of "resistance" is possible save not obeying the law and going to jail? *Cf.* f. n. 24, p. 26, Pet. Op. Br. here.

[10]In answer to the second question posed in the quotation, we recognize that there may have been individual cases of conscripts in the United States going voluntarily and we are not saying that the same thing may not have been true in Japan. What we do say, in answer to the question, and we do not think we are being unpatriotic, rather are we just recognizing the facts of life, is that the chances are that the average conscript under our draft laws who complies does so involuntarily; that *if given the choice* (*cf.* Webster's definition of the word "voluntary") between going and not going, the vast majority of our conscriptees would not go. Particularly is this so in peacetime. Were the fact otherwise, there would be little, if any, need for our draft acts ever to have been enacted.

[11]This aside from the extra-legal effect such efforts would have had in Japan. *Cf.* recognition as to similar extra legal effect in Italy. *Acheson v. Maenza*, 202 F. 2d 453, 459.

On the record in this case, respondent's efforts (Resp. Br. 29-31) to distinguish away the Attorney General's *Panzica* opinion sound thin indeed. It is difficult to see how consideration of "the surrounding circumstances (here) show a genuine desire to serve and adhere to the foreign country, rather than mere submission to its laws." (From the Attorney General's *Panzica* opinion, Resp. Br. 31.) Rather do we suggest that more properly should it be said "that there is no indication of any such desire in Mr. (Nishikawa's) record." (*Ibid.*)

The *Lehmann* case is correct law. That court's wonderment at the Government's illogic is, of course, quite in order, especially in view of the Governments representation to this court in *Kazakita* (Br. in Opposition, No. 220, Misc. Oct. Term 1951, pp. 11-12) that "Petitioner was unequivocally excused for conduct required of him by the laws of Japan."

We note that respondent suggests (Resp. Br. 30) that a dual national in a foreign country could obtain aid from the Government of the United States in obtaining an exception to military service. This is simply not the fact. With all due respect, we respectfully suggest that respondent knows this. In this connection we point out that respondent in his brief has eschewed comment upon his own bulletin (State Department Publication No. 1316, par. 29, p. 17; quoted from at p. 28 of Pet. Op. Br.); or upon Orfield's article in 17 Geo. Wash. L. Rev. 427, 429, 431 (quoted from at p. 38 of Pet. Op. Br.) to the effect that no such representations are made, nor would they be effective if made. Respondent also has not distinguished or explained the Government's representation to this court in the *Kazakita* case (p. 11-12 of Br. in Opposition) that "the country of residence can force

such a national to serve in its armed forces." (See Pet. Op. Br. here, p. 37.)

Moreover, we believe respondent is turning on end the reasonable inferences to be drawn from the facts of this case as distinguished from one where the person has spent all his life in the country of his other nationality. (Resp. Br. 31-32.) It is true that the trial court [R. 55], as does respondent, felt that there is a difference where a person has all his ties in the foreign country and then serves by reason of conscription; that there he serves under duress. We suggest, on the contrary, that if the time of the citizen's going to the foreign country is of significance, just the opposite inference should be drawn. To do otherwise is to suggest that our American way of life, our American education, is a dismal failure, and that what we have inculcated in a lad over a period of many years, falls by the wayside during a few months residence in a foreign land. The instant case is a good example. Petitioner had *no ties* in Japan, he could not even read the language, his father and mother were here, he had only an American education. If any inference is to be drawn at all, it should be just contrary to that which respondent draws.[12]

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[12]It is noted that in the *Hamamoto* case, the plaintiff went to Japan in 1940. Here he went in 1939. These cases stand alone, however. Other courts have not drawn such an adverse inference. The following cases all held for the plaintiffs and are instances of late goers to Japan: *Ishikawa v. Acheson*, 85 Fed. Supp. 1949 (D. C. Haw.), plaintiff went in 1937; *Matoyama v. Acheson* #881, D. C. Haw.) plaintiff went in 1940; *Furukawa v. Acheson*, #8913, S. D. Cal., plaintiff went in 1941; *Murata v. Acheson*, 111Fed. Supp. 306 (D. C. Haw.), plaintiff went in 1940; *Yoshida v. Dulles*, 116 Fed. Supp. 618 (D. C. Haw.), plaintiff went in 1941; *Okada v. Dulles*, 134 Fed. Supp. 183 (D. C. N. D. Cal.) plaintiff went in 1941 even after having registered here under the 1940 draft act.

Respondent states (Resp. Br. 32): "Petitioner voluntarily subjected himself to the foreign draft law, and there was no showing that he could *not* have avoided service if he had tried." This line of reasoning not only disregards the fact that it is the government which must prove *its* case by the very strong standard required, and not only does it disregard cases such as *Monaco v. Dulles*, 210 F. 2d 760, 761 (C. A., 1954) where the plaintiff actually "ignored the warnings of the State Department, made in response to Italian laws of dual nationality, to secure permission to enter Italy without liability for military service," but reduced to its true meaning, respondents argument is simply that petitioner went to Japan. On such a slender reed expatriation does not rest.

Respondent glosses over the record when he states (Resp. Br. 31, 3, 4) that when petitioner went to Japan he knew "his name was in the family register there and that he was a national of that foreign country." The evidence is [R. 34] that he knew these facts at the time he entered the army in 1941. It does not follow, even if material,[13] that he knew such facts when he left the United States in 1939. This makes even more erroneous the trial court's findings [R. 11] that when petitioner went to Japan in 1939 he knew "he was likely to be called for military service in the Japanese Armed Forces." There is not one single shred of evidence to support such a finding even were this an ordinary case; nor does respondent suggest any.

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[13]Which it is not. (*Cf. Monaco v. Dulles*, 210 F. 2d 760, 761 (C. A. 2 1954).)

C.

The Government Has the Ultimate Burden of Proving That Petitioner's Conduct Was Voluntary. (Reply to Respondent's Point I, C; Resp. Br. 33-45.)

The Government's reliance (Resp. Br. 34-36) on the legislative history is as misplaced here as it was in *Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 860 (C. C. A. 1, 1947) where it argued that the subsection here in question applied to involuntary as well as voluntary conduct (see 161 F. 2d at 864, n. 4, and 865). In *Dos Reis* the Government had argued that the fact that the Committee had not put in the word "voluntary" when requested so to do by Mr. Henry F. Butler, showed that Congress intended the subsection to apply to involuntary conduct. The Government retreats from that argument here, of course, but now argues (Resp. Br. 36) that the failure to insert that word means that it was establishing a new definition of expatriation, namely that expatriation means service in a foreign army,[14] *provided* that one could be excused from expatriation if he showed his act was not voluntary. As did the court in *Dos Reis* (161 F. 2d at 864, fn. 4) we believe the failure to insert the word "voluntary" had no such sweeping purpose; "that the failure of the committee to accept this amendment is of little significance in view of the legislative history . . . indicating that such amendment was unnecessary and superfluous." (*Ibid.*)

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[14]At the time of the Fluornoy-Butler involuntary-voluntary proposals, the Senate Amendment (86 Cong. Rec. 12817; Sen. Rep. #2150, 76th Cong. 3d Sess. to accompany H. R. 9980, p. 3) requiring the possession or acquisition of the foreign nationality was not yet in the bill. (Pages 358, 387 of Hearings before the Comm. on Imm. & Naturalization, H. of R. 76th Cong. 1st Session H. R. 6127 superseded by H. R. 9980).

Respondent characterizes (Resp. Br. 30) petitioner's argument as a contention "that voluntariness is a condition precedent to expatriation." The particular choice of words to define what expatriation is, is unimportant. We prefer, however, this Court's definition, which we believe to be the law, that "expatriation *is* the *voluntary* renunciation or abandonment of nationality." (*Perkins v. Elg*, 307 U. S. 325, 334.) (Italics added.) We agree with the Third Circuit that "the *very essence* of expatriation is that it be voluntary." (*Dorcau v. Marshall*, 170 F. 2d 721, 723.) (Italics added.) If this be so—if the very heart of expatriation is that it be voluntary—we can see no escape from the rule being that the ultimate burden of proving the essence of expatriation is upon the Government which must prove expatriation in the first place.

Reliance by respondent (Resp. Br. 30) upon the out of context statement of Congressman Rees is surprising. It is perfectly clear that the Congressman was not speaking of an expatriation case at all; nor was he speaking of Section 401(c). The statement of the Congressman was during the colloquy on that portion of the Conference Report (86 Cong. Rec. 13244) which agreed to the addition of Section 503 and had to do with the obtaining by a person out of the country of a Certificate of Identity enabling him to come here and testify in his court trial.[15]

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[15]Specifically the answer was in response to a long statement and question by Congressman Jenkins some of which we set out here. (86 Cong. Rec. 13247, 13248)

> "What you are saying in this amendment is that a man who has never been in the United States at all but who claims he is a national either because his parents were, or on some other ground *but is not, in fact*, a national, can make applica-

All the Congressman was saying is that one who claims to be a national, must initially establish his claim to citizenship.[18] Petitioner has no quarrel with this. The nature of what that initial proof will be will depend, of course, on the issue involved: whether the person was born a citizen, the government claiming he was not (*e.g., Dulles v. Quan Yoke Fong*, 237 F. 2d 496 [C. A. 9, 1956], *Dulles v. Tom Suey Jin*, 237 F. 2d 500 [C. A. 9, 1956], *Chin Chuk Ming v. Dulles*, 225 F. 2d 849 [C. A. 9, 1955]) or whether the Government admits the person was born a citizen but claims he has expatriated himself, as here. Under the expatriation cases, there is no problem of proving citizenship at birth, the Government admitting

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tion in our courts to have tested the question of whether he is a national . . .

"This law goes too far in this respect . . .

"Of course you have one very fine provision in here. If the consul over there is on his job he can make that fellow prove all these things before he gives him a certificate (of identity), but if he is inclined to be loose he may say, 'We will let him go through.' He claims he is a national and we will give him a certificate. . . . We should make our immigration laws fair . . . but we cannot be too strict toward the imposters . . .

In answer to this, Congressman Rees said (80 Cong. Rec. 13248):

"Under the present law, the individual the gentleman from Ohio is talking about (one not born here who claims derivative citizenship from his parents) does not have to go through any process at all. . . . In this act (in order to get a certificate of identity) we put the burden of proof upon *that individual* to show that he is a citizen or national of the United States . . ." (Italics and parenthesis added).

[18]Section 503 does not require that this initial proof be conclusive. It need only be in good faith and have substantial basis

it in the issuance of the Certificate of the Loss of the Nationality of the United States." [R. 12, 13, 20-21.][17]

Similarly is respondent's reliance (Resp. Br. 37-39) upon Section 402 of the 1940 Act (8 U. S. C. [1946 Ed.] 802) misplaced. In the first place, respondent is in error when he says (Resp. Br. 37, 38) that the "presumption (of 402) can be overcome, of course, by proof that the claimant did not enter the foreign army or take a government job, but until proof is made the presumption of expatriation 'shall exist.'" This statement contradicts respondent's previous statement (Resp. Br. 37), which *is* the law, that "(s)ection 402 does not enlarge upon the substantive requirements of Section 401(c)."[18] Unless and until there is proof that the citizen served in a foreign army or had a government position for which only nationals of that country were eligible,[19] there is simply

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[17]Of course, even in the actual trial of a 503 action, the burden of proof problem will vary depending upon the nature of the issue. If it is a case where the plaintiff claims he was born a national of the United States and defendant claims he was not, the burden is upon plaintiff to establish that fact. Examples are the Chinese cases (*e. g.*, *Lee Shee v. Dulles*, 219 F. 2d 413; *Lee Shee v. Broxnell*, 219 F. 2d 301). But where, as here, it is an *expatriation* case, the Government admitting (R. 21) that plaintiff was born a citizen of the United States but contending that he *expatriated* himself, of necessity, both in logic and, as the cases have shown, the burden of proving that expatriation lies with the Government; and it is a burden of the heavy nature described that must be borne as to *all* elements of expatriation throughout the trial.

[18]In *Dos Reis, ex rel. Camara v. Nicolls*, 161 F. 2d 840, 848, the language of the First Circuit was that the section "does not enlarge the content of §401(c)."

[19]*Cf.* these reported cases decided under section 401(d): *Oye v. Acheson*, 110 Fed. Supp. 635, 636 (D. C. N. D. Cal. 1953); *Furuno v. Acheson*, 100 Fed. Supp. 775 (D. C. S. D. Cal. 1952); *Nato v. Acheson*, 100 Fed. Supp. 770 (D. C. S. D. Cal. 1952); *Furusho v. Acheson*, 94 Fed. Supp. 1021, 1023 (D. C. Haw. 1951).

not the faintest suggestion of expatriation and no presumption can arise from the non-existent facts and certainly cannot "exist."

Whatever may be the ultimate burdens of the parties in a case like this, it is clear that 8 U. S. C. 802 cannot aid respondent in this case because, under the circumstances here, its force is quickly and early spent. For, as this court said in regard to the section from which 8 U. S. C. 802 was taken (Sec. 2 of Chap. 2534 of the Act of March 2, 1907, 34 Stat. 1228, 8 U. S. C. 16 and 17):

> "(I)t is a presumption easy to preclude and easy to overcome."
>
> *United States v. Gay*, 264 U. S. 353, 358.

Accord:

> *Camardo v. Tillinghast*, 29 F. 2d 527, 530-531 (C. A. 1, 1928);
>
> *United States v. Eliasen*, 11 F. 2d 785, 786 (D. C. W. D. Wash., 1926);
>
> *In re Alfonso*, 114 Fed. Supp. 280 (D. C. D. N. J., 1953).

Moreover, the last three cited cases, as well as *Garcia Laranjo v. Brownell*, 126 Fed. Supp. 370, 372-373 (D. C. N. D. Cal., 1954), make the point, approving the opinion of Attorney General Wickersham (28 Op. Atty. Genl. at 508), that the section has no other purpose than to fix a time limit for a citizen residing overseas beyond which the Government is relieved of the obligation to protect such citizens residing abroad, and that the section does not establish a rule of expatriation.

Kawakita v. United States, 343 U. S. 717, makes it very clear that it was following this court's previously established rule in the *Gay* case that the presumption of 8 U. S. C. 802 is "easy to preclude and easy to overcome," when it said (343 U. S. at 723-725) that merely obeying the law of the country in which one resides by a dual national, is not expatriating.

This demonstrates, we submit, that the most that can be said of Section 402 in aid of respondent's case, is that even if the section is a part of respondent's proof in this case, it was quickly and completely overcome by the evidence that petitioner's military service was due to conscription under law, to say nothing of the fact that the conscription was in militaristic, tyrannical Japan.

McGrath v. Abo, 186 F. 2d 766, cited by respondent (Resp. Br. 39), is inapposite. That case had to do with 8 U. S. C. (1946 Ed.) 801(i), an actual *formal renouncing* of United States citizenship. When one *formally renounces* his citizenship, the element of voluntary throwing off one's nationality is inextricably bound up in the act of renunciation. This is a far different thing from the act involved in the case at bar where the Government is seeking to *impose* loss of citizenship under a theory of *implied* abandonment or renunciation. Moreover, the *Abo* case was an action to *rescind* the renunciations and to *set them aside*. Thus the posture of that case was quite different from the case at bar. In addition to which that decision was before this Court's decision in *Gonzales v. Landon, supra*.

Furthermore, the *Abo* case actually supports petitioner, not respondent. For that case held that because of the conditions at Tule Lake at the time of the renunciations "a rebuttable presumption arises . . . . that their acts of renunciation were involuntary." (180 F. 2d at 773) and without evidence rebutting this presumption, plaintiffs were entitled to judgment (*ibid.*, at 774). The conditions at Tule Lake were comparable with those in Japan (*cf. Fukumoto v. Dulles*, 216 F. 2d 553, 554 [C. A. 9, 1954]).

We have pointed out above (pp. 6, 7) the inappositeness of respondent's analogy to the *defense* of insanity cases as to burden of proof. The same is true of the land-grant and patent analogy advanced by respondent (Resp. Br. 39). Respondent's difficulty stems from his failure to understand what expatriation is. Involuntary conduct is not merely a *defense* to expatriation; voluntary conduct is the very *essence* of expatriation (*Dorcan v. Marshall*, 170 F. 2d 721, 723), without which there is nothing as to which there can or should be a defense to. (*Perkins v. Elg*, 307 U. S. 325, 334.) In other words, voluntary conduct is one of the indispensable elements of expatriation, just as are, in this case, service in the foreign army and nationality of the foreign state, and the Government has the burden of proving all the elements of same.

This is a different thing, of course, from the burden of presenting evidence "to repel what has been proved." (*Morrison v. California*, 291 U. S. 82, 88, 89) (relied upon by respondent [Resp. Br. 41-44]). In this second

Morrison case this court, in explaining the first *Morrison* case (288 U. S. 591) was talking about proof of a fact "in justification or excuse of an act otherwise illegal" (291 U. S. at 89.) But such is not the case here. Unless and until the Government proves, and by the standard required, that the conduct was voluntary, there *is* no otherwise illegal or expatriating act. Moreover, in the first *Morrison* case, the *fact* as to which this court said the burden might properly be put upon defendant was "as to the place of birth" (291 U. S. at 89) "to show that by reason of his birth he was a citizen already." (291 U. S. at 88.) This, therefore, is no different from the requirement petitioner had here to show and did show, that he was born a citizen, or that plaintiffs in Section 503 cases have who, though born abroad, claim they have derivative citizenship (see discussion, *supra*, pp. 15-17). But it is not the same thing as requiring petitioner to show that he *lost* that citizenship; that burden is on the Government as to all elements.

Similarly is *United States v. Fleishman*, 339 U. S. 349 (Resp. Br. 41) not in point. This court was there talking about requiring the defendant "to present evidence to sustain" a defense. As stated, such is not our case here.

Respondent's attempted application of the rule as to burden of proof is misapplied in the case at bar, and does, we submit, run counter (see Resp. Br. 44) to this court's decision in *Gonzales v. Landon*, 350 U. S. 920. We have previously discussed (Op. Br. 14-16) the point that in *Gonzales* the petitioner had claimed that the Government had not proved the voluntary character of his act, and that this court so held in its decision.

D.

The Voluntariness of Petitioner's Conduct Has Not Been Established. (Reply to Respondent's Point I, D; pp. 45-50.)

Respondent argues (Resp. Br. 45) that if petitioner had the burden of proof, petitioner failed to carry it because the courts below held against him. This argument has been answered in petitioner's opening brief (pp. 16-35). However, because it is so apropos, we add here these words from a decision of the Board of Immigration Appeals (*Matter of G—R—*, 3 I & N Dec. 141, 154):

> "(W)here a person's conduct permits of two or more reasonable inferences, one unfavorable and the other or others favorable, we ought not to expatriate that person through a process of reasoning that gives no weight to the favorable inferences and that reaches the result by pyramiding one unfavorable inference upon another."

In his argument that if the Government has the burden of proof, the Government has sustained it (Resp. Br. 45-50), respondent, despite this court's decisions in *Baumgartner*, *Schneiderman*, *Perkins* and *Gonzales*, turns both the evidence and logic on end.

It must be remembered that *the Government introduced no evidence in the case.* [R. 49-50.] Therefore the "proof" upon which it relies to sustain *its* burden is the testimony of petitioner. Accordingly, the curious logic aside that the trial court was not required to believe that petitioner was himself the victim of terror conditions in Japan (Resp. Br. 46),[20] respondent's entire proof rests

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[20]Petitioner's Opening Brief discusses (p. 33) the fact that this was not really the basis of the trial court's ruling.

solely and completely upon *petitioner's testimony which the trial court did believe* as to what petitioner did not do. Refutation of this line of argument is also set forth in petitioner's opening brief (pp. 24-28, 31-32, 33-34).

We read this court's *Baumgartner*, *Schneiderman* and *Gonzales* decisions, and its admonition in *Perkins v. Elg*, 307 U. S. 325, 337 that "(r)ights of citizenship are not to be destroyed by an ambiguity," and its refusal in *Kawakita v. United States*, 343 U. S. 118, 122, to construe another subsection of 401 "so as to provide treacherous ground for the loss of rights of citizenship" as meaning not only that the Government is held to the strictest standard of proof in an expatriation case, but also that the factual record is to be read as far as is reasonable in favor of the citizen. We have pointed out above p. 13) respondent's erroneous reading (Resp. Br. 46-47) of the record as to when petitioner can be said to have known he was a national of Japan.[21] This is not construing the facts as far as is reasonable in favor of the citizen; it is construing the facts contrary to what the evidence is. Respondent belittles (Resp.

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[21]Respondent exhibits facility and dexterity for picking and chosing from petitioner's testimony, *none of which was contradicted*, as to which part should be believed and which part should not. Thus respondent does believe (Resp. Br. 47) that petitioner was beaten in the army for answering, in response to a question, that America would win the war. But he chooses not to believe (Resp. Br. 48) that petitioner feared harm from the Kempei Tei if he attempted to avoid the draft. (*Cf. Acheson v. Maenza*, 202 F. 2d 453, 459 where the court recognized that in Italy, even as early as 1935, "opposition to military service (would have been) not only futile and unavailing but exceedingly dangerous to the safety and perhaps the life of the person voicing such opposition." Respondent calls this (Resp. Br. 48) "timorousness." Thus respondent adopts the rejected "Spartan standard by which to determine whether (petitioner) acted voluntarily." (*Mendelsohn v. Dulles*, 207 F. 2d 37, 39 [C. A. D. C. 1953]).

Br. 48) petitioner's testimony [R. 28, 30][22] that during the interval between petitioner's physical examination (June, 1940 [R. 18]) and his induction into the army (March, 1941 [R. 18]) he did not know that the United States was drafting men. Aside from the fact that respondent's doubt does not supply evidence to the contrary,[23] respondent overlooks the fact that draft registration in the United States was not until October 16, 1940 (First Report of the Director of Selective Service, "Selective Service in Peacetime," (Govt. Printing Office, 1942, p. 73) and no one was inducted until November, 1940 (*Ibid.*, p. 121).

And respondent reads other portions of the record with only half an eye. Thus respondent doubts (Resp. Br. 48) petitioner's testimony [R. 29] that he did not read newspapers between September 16, 1940[24] and March, 1941. Aside, again, from the fact that respondent's doubt is not evidence that the petitioner did so read newspapers, and aside from the fact that respondent introduced no evidence to show what the newspapers contained, respondent disregards the further testimony that petitioner could not read Japanese characters [R. 29] and that the Nippon

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[22]Part of the testimony, by the way, on which respondent relies for its proof of voluntary conduct, and which he himself elicited.

[23]*Controller of California v. Lockwood*, 193 F. 2d 169, 172 (C. A. 9, 1951):

> "... Suspicion, no matter how aroused is not evidence.
>
> "... Courts may not find facts from speculation, no matter how difficult or impossible it may be to produce evidence establishing the fact in dispute."

[24]Apparently respondent had reference to the effective date of the Selective Training and Service Act of 1940 (54 Stat. 897).

Times[25] was not delivered out in the country where he lived [R. 29].

Respondent speaks [R. 48] of *forsaking* American citizenship in a difficult situation. Such a contention, we submit does not apply in this case. Moreover, it is stretching the facts beyond reason to say (Resp. Br. 48) that "petitioner's course of conduct" is *proof* of voluntariness. Furthermore, respondent's suggestion blithely ignores the fact that even in democratic United States an enemy alien had no right to relief from military duty under the 1940 Selective Service Act (*In re Gourary's Petition*, 148 Fed. Supp. 140, 142 (D. C. S. D. N. Y., 1957) citing section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885), and that we did, indeed, insist upon drafting such persons or punishing them by the criminal law if they did not obey (*Takeguma v. United States*, 156 F. 2d 437 [C. A. 9, 1946]).

There is no reason in logic, law or otherwise, for relieving, as respondent suggests (Resp. Br. 48-49), the Government of the requirement of proving the element of voluntary conduct to effect expatriation by the same high standard of proof as any other element. Indeed in the very cases which enunciated the rule as to the Government's burden (*Baumgartner* and *Schneiderman*), the question involved was subjective intent. In the criminal law intent is likewise "intimately linked with an individual's private will and particular mentality." (Resp. Br. 48-49). Nevertheless, the Government must prove this element of the crime, as well, by proof beyond a reason-

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[25] An English language newspaper published in Tokyo. (See depositions of Togosaki, pp. 1-2, and of Murayama, p. 1, lodged with the clerk of this court).

able doubt (*Onieu v. United States*, 349 U. S. 155, 165). It is a moot question as to whether the standards, "clear, unequivocal and convincing" and that expatriation cannot be effected "upon a bare preponderance of evidence which leaves the issue in doubt" (*Schneiderman v. United States*, 320 U. S. 118, 125) are the same as the "beyond a reasonable doubt" standard. Certainly the former require no less than the latter. If anything, the former is a greater standard than the latter for the proof must be "indeed overwhelming" (*Meyer v. United States*, 141 F. 2d 825, 827 [C. C. A. 5, 1944]).

Measured by these standards, respondent's contention (Resp. Br. 49) that the Government *proved* voluntary conduct, is not well taken.[26]

Respondent contends (Resp. Br. 49) that the materials lodged with the clerk of this court (see also Appendix to Petitioner's Opening Brief) in aid of the court's taking judicial notice of conditions in Japan should be disregarded. He does not contend, however, that this court cannot take judicial notice of such conditions, nor does he dispute, as of course, he cannot, the authorities cited by petitioner (Op. Br. p. 6, fn. 6; p. 22, fn. 20) to the effect that this court can, in aid of its judicial knowledge, take notice of the contents of the material. Even without such documentary aid, this court is not required "to shut

[26] The reference (Resp. Br. 49) to the court below's statement that the proof was clear and convincing had to do with the proof that petitioner had entered and served in the armed forces of Japan. (R. 75) not with whether the proof of voluntary conduct measured up to the standard. The court had already held that this element (involuntariness) was for petitioner to prove (R. 73).

(its) eyes to what all others . . . can see and understand." (*United States v. Butler*, 397 U. S. 1; 61.)[27]

Respondent's citation (Resp. Br. 50) of *Saccodato v. Dulles*, 226 F. 2d 243 (C. A. D. C., 1955) does not aid him. The case supports petitioner. For in that case the court reversed, as "clearly erroneous" (p. 247) the trial court's finding of voluntary military service, pointing out (p. 244) that in other cases "(a)rmy service in Italy under conditions there existing has been held to have been under legal compulsion."

II.

Section 401(c) of the Nationality Act of 1940 Is Unconstitutional (Reply to Respondent's Point II; Resp. Br. 50-51).

We comment here only on the Government's reference in its brief (pp. 38-39) in *Perez v. Brownell*, No. 572, this term, to section 401(c).

The Government speaks (Resp. Br. Perez, p. 38) of the "obvious possibility of conflict between two nations over the military service of the dual-national." But in considering the constitutional power of Congress to de-citizenize a citizen who is such by virtue of the Constitution and not Congress, that possibility is a *non-sequitur*. The possibility has never deterred us from requiring

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[27] *Cf. Acheson v. Maenza*, 202 F. 2d 453, 459 (C. A. D. C. 1953).

> "That testimony must be considered in connection with the well-known ruthlessness of the Fascist regime which, even as early as 1935, would hardly have tolerated resistance to its draft laws by an admitted national of Italy."

The trial court in the instant case was aware of these conditions (*Cf. Kondo v. Acheson*, 98 Fed. Supp. 884-887, Resp. Br. here p. 46, f. n. 19) but disregarded them.

military service by aliens.[28] And our right to so do has been upheld.[29] As pointed out at 25 So. Calif. L. Rev. 196, 198-199: "according to American legal theory, . . . the duty to serve in the armed forces (is not an) exclusive attribute of citizenship." It is unreasonable, therefore, the question aside as to the lack of delegated power in the Constitution, express or implied, to decitizenize, for Congress to be able to say that an alien may serve in the United States Armed Forces and still remain an alien (or dual citizen, as the case may be), but if he does the same thing in another country, he loses his citizenship here. If Congressional power to so ordain rests upon a theory of implied consent, the incongruity becomes even greater.

Moreover, the theory that Congressional power to decitizenize rests upon the problem of dual nationality, leads to an absurd result. It means that as to those countries whose laws provide that descendants of citizens of those countries are nevertheless citizens thereof,[30] Congress has the power to strip away United States citizenship if they serve in the foreign army. But as to those countries which have no such laws, Congress cannot so do. In other words Congress' *constitutional power* in this field depends upon the laws of a foreign country. We are aware of no such principle of constitutional law.

[28] Section 3(a), Selective Training and Service Act of 1940, 54 Stat. 885; Section 4(a), Selective Service Act of 1948, 62 Stat. 605, 50 U. S. C. Appx. 454(a). These sections also permit aliens to volunteer.

[29] *Takeguma v. United States*, 156 F. 2d 437 [C. C. A. 9 1946].

[30] Even if they or their ancestors renounced their citizenship as to such country. (*Cf.* historical statement in Petitioner's Opening Brief in *Perez*, p. 10).

An American citizen who has only American citizenship and serves in a foreign army, and it could be against his own country,[31] traduces, to use the Government's words (Resp. Br. p. 39, No. 572) the most essential obligation of the citizen, just as much as does the citizen with dual nationality.[32]

A.

Section 401(c) Should Not Be Construed to Apply to the Facts of This Case.

Respondent misunderstands (Resp. Br. 50-51) petitioner's argument (Op. Br. 30-40). The point is not that the section should not be applied to dual nationals *per se*, but that, in order to avoid unconstitutionality, when that fact (dual nationality) is coupled with compulsory military service under law plus physical presence in the country commanding the military service, absent any other conduct indicating a desire to expatriate, the Act has no application. This must be the proper interpretation if this Court's statement in *Kawakita v. United States*, 343 U. S. 717, 723, 725 (set forth at pp. 36-37 of App. Op. Br.) means anything.

This does not mean, as respondent suggests (Resp. Br. 51) that the section would have no application or function whatever. On the contrary, such an interpretation would reach the very thing at which Congress was aiming. See discussion, as to the legislative intent set

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[31] Cf. fn. 28, *supra*, p. 28.

[32] The present act (8 349 (a) (3), Immigration and Nationality Act, 1952, 66 Stat. 267, 8 U. S. C. 1481 (a) (3)) does not require dual nationality as a condition of expatriation.

out in *Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 860, 863-867. It would reach the person who, by his conduct, shows that his "real attachment is to the foreign country and not to the United States." (*Ibid.*, p. 864.) It would not reach the person who merely obeys the laws of the country in which he is residing (*Cf. Takeguma v. United States*, 156 F. 2d 437 [C. C. A. 9, 1946]), as to which person the Government successfully argued to this Court (Br. in *Kawakita*, referred to at p. 11, *supra*), he is "unequivocally excused."

Conclusion.

The judgment of the court below should be reversed and petitioner declared to be a national and citizen of the United States.

Respectfully submitted,

A. L. Wirin,

Fred Okrand,

Attorneys for Petitioner.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1957

No. 19

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT.

This Reply Brief will be directed only to Respondents' Supplemental Brief on Reargument having to do with the *Nishikawa* case (No. 19).

I.

The Necessary and Proper Clause Furnishes No Constitutional Delegation of Power to Congress to Decree Involuntary Expatriation Because of Foreign Military Service (Reply To Respondents' Point I, B, 1, pp. 5-6).

Respondents argue (Br. 5) that Congress, under its express power to regulate foreign affairs, has the power to prohibit, by making it a crime, the voluntary entrance of an American dual national into the armed forces of his other state. They then argue (Br. 6) that this same

power sustains the right of Congress "to provide, not criminal punishment, but loss of nationality."

Assuming, *arguendo*,[1] that Congress could make the conduct defined a crime, the argument misses the point. The conclusion does not follow from the premise. There is no constitutional right of freedom from punishment for crime, whether at home or abroad.[2] On the contrary, the power of Congress to provide for the punishment of crime is implicit throughout the Constitution.[3] Whereas the right of a native-born person to the status of citizen is a specifically constitutionally given right (14th Amendment). This right can no more be taken away by Congress under the guise of the power to regulate foreign affairs, when taken in conjunction with the Necessary and Proper Clause, than can the right of a civilian to a trial by jury be taken away by Congress under the guise of its power (Art. I, §8, Cl. 14 "To make Rules for the Government and Regulation of the land and Naval Forces", when taken in conjunction with this same Necessary and Proper Clause *(Reid v. Covert*, 354 U. S. 1, 1 L. ed. 2d 1148, 25 U. S. L. W. 4444; *United States ex rel. Toth v. Quarles*, 350 U. S. 11).

[1] Surely a grave question of due process would be present if Congress were to make it a crime against the United States to obey a conscription law in a foreign land, violation of which is a crime there. "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders." *Wilson v. Girard*, 354 U. S. 524, 1 L. ed. 2d 1544, 1548. It is not without significance that Congress has not made the suggested conduct a crime.

[2] *Cf. United States v. Bowman*, 260 U. S. 94; *Blackmer v. United States*, 284 U. S. 421.

[3] E. g., Art. III, §2, Cl. 3; Art. I, §9, Cl. 3; 6th Amendment; 5th Amendment, 8th Amendment. *Cf. United States v. Fox*, 95 U. S. 670; *United States v. Hall*, 98 U. S. 343; *Hyde v. Shine*, 199 U. S. 62, 81; *Chicago B. & Q. R. Co. v. United States*, 220 U. S. 559, 578.

II.

Military Service by Reason of Compulsory Law Carrying Criminal Punishment for Violation Thereof Is Prima Facie Conduct Under Duress (Reply to Respondents' Point IV, pp. 23-28).

A.

The Okimura and Murata Cases Did Not Decide the Question.

Respondents are quite in error when they suggest (Br. 23) that this Court in *Acheson v. Murata*, 342 U. S. 900 and *Acheson v. Okimura*, 342 U. S. 899, has already determined that proof of conscription into the foreign army is not enough to show duress.

That question was not before the Court in those cases nor even remotely suggested to it. The question was neither raised nor argued.

The rule that this Court will not consider a question not raised by petitioner or appellant is well known (*General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357 n.; *Irvine v. California*, 347 U. S. 128, 129; *Mazer v. Stein*, 347 U. S. 201, 206, n. 5; *Radio Officer's Union v. National Labor Relations Board*, 347 U. S. 17, 37, n. 35).[4] "The purpose of requiring a statement of the Questions Presented is, of course, to apprise the Court and the

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[4]This Court does have the power to notice a plain error not assigned (*United Brotherhood of Carpenters v. United States*, 330 U. S. 395, 412) but the exercise of that power is most unusual and is not encouraged (*Cf. Terminiello v. Chicago*, 337 U. S. 1, 6, 7-12). Certainly it is going far afield to assert, as apparently respondents do, that the Court exercised that power in the *Okimura* and *Murata* cases where the Court heard no argument. The cases were not briefed and the Court's *Per Curiam* decisions were based merely on the preliminary papers on appeal.

respondent of the issues which thy petitioner is seeking to have reviewed." (Stern & Gressman, *Supreme Court Practice*, BNA, 2d Ed., 1954, p. 195).[5] The wisdom of the rule and its purpose is amply demonstrated in the instant case where respondents here are seeking to carve out of the *Okimura* and *Murata* orders a decision on a substantial question which was not ever before the Court.

In its Statement as to Jurisdiction in the *Murata* case (No. 422, Oct. Term, 1951),[6] the Government thus set forth the Question Presented (p. 2):

> "Whether Congress has the constitutional power to provide, as it has in Section 401(e) of the Nationality Act of 1940, that a person who is national of the United States by birth shall lose his nationality by entering or serving in the armed forces of a foreign state, if he has or acquires the nationality of such foreign state."

In its argument under the heading: "The Question is Substantial" (pp. 3 and 4), the Government referred to its Statement in the *Okimura* case where it had only argued the constitutional issue. It described the decision of the District Court as a holding "that Congress had

[5] At page 241 of the cited book, the authors state that the same discussion is applicable to an appeal. In their First Edition (1950) under the former rules (in effect at the time of *Okimura* and *Murata*), Stern and Gressman point out (p. 223) that then the Assignment of Errors was the equivalent of the Questions Presented and Specification of Errors on a Petition for Writ of Certiorari and they recommended the inclusion of a statement of the questions presented in the Jurisdictional Statement. As we shall see, the Government did just that in the *Okimura* and *Murata* cases.

[6] The Statement in the *Okimura* case (No. 421), is identical save in *Okimura* subsection (e) (voting) of 8 USC 903 was also involved.

no constitutional power to divest an American born citizen of his nationality because he served in a foreign army."

In his Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, appellee urged that the lower court's decisions could be sustained on two grounds: (1) that the statute was correctly decided to be unconstitutional; and (2) that appellee had not acted voluntarily, but rather under duress and coercion and that therefore the constitutional question need not be reached. Nowhere in appellee's statement was there any suggestion concerning conscription raising a rebuttable presumption of involuntary conduct.[7]

In its Memorandum for Appellant in Opposition to Appellees' Motion to Dismiss or Affirm,[8] there is again no mention of the conscription question.

However, a further perusal of appellant's memorandum will demonstrate just what the Court did do in its Per Curiam orders.

Thus appellant argued to this Court (p. 4) that:

> ". . . It might be that the trial court on the basis of these facts[9] would conclude that the resulting acts of appellees were involuntary.[10] But the court below made no such finding. It based its entire decision on the one conclusion of law it made.

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[7] *Lehmann v. Acheson*, 206 F. 2d 592 (CA 3 1953), wherein the concept was first articulated, had not yet been decided.

[8] The Government filed a joint memorandum in the two cases.

[9] Appellee had argued that the trial court had held that he had acted involuntarily.

[10] Appellant was lumping its argument in both cases together and was arguing identically on the voting issue.

re that 8 U. S. C. 801(c) and (e) are unconstitutional."

Then appellant went on to say (p. 5):

"True, the District Court made what might be considered subsidiary findings as to voluntariness. It did not, however, make the ultimate finding on that question. It cannot be said, therefore, that the District Court's judgments are sustainable on the ground advanced by appellees. Rule 52(a) of the Federal Rules of Civil Procedure requires the District Court to make findings of fact and conclusions of law. It has been the settled practice of this Court that when a lower court fails in this duty, *this Court will not search the record* to find a basis for the lower court's order, but will remand the cause for appropriate orders. . . ." (Italics added.)

Which is precisely what this Court did.

Indeed, it may more appropriately be argued, as we did so in the Opening Brief herein (p. 18) that, if anything, this Court decided in *Mandoli v. Acheson*, 344 U. S. 133,[11] that conduct pursuant to military conscription laws is involuntary.

B.

The Cases Discussed by Respondent.

The Government has been able to cite (p. 24) but two cases (*Zimmer v. Acheson*, 191 F. 2d 209 (CA 10 1951) and *Coumas v. Brownell*, 222 F. 2d 331 (CA 9 1955)) as to which it can claim held that military service or acts flowing therefrom were not under duress. It recognizes (pp. 25-28) that the overwhelming number of

[11]Decided subsequent to the orders in *Okimura* and *Murata*.

cases have held such conduct to be involuntary,[12] but it seeks to distinguish them. The cases respondent seeks to distinguish are entitled to the more weight, not only because they held the conduct to be under duress, but also because, for the most part, they are cases of reversal by the appellate court of trial courts holding on the facts that the conduct was voluntary.

The holding of the *Zimmer* case was basically that appellant, a naturalized dual citizen, had lost his United States citizenship under Section 2 of the Act of March 2, 1907[13] by living for a lengthy period of time in the country of his native nationality. (Cf. *Lapides v. Clark*, 176 F. 2d 619 (CA DC 1949), cert. den. 338 U. S. 860, reh. den. 338 U. S. 888). The remaining portion of the opinion relating to whether citizenship was lost because of the taking an oath of allegiance was unnecessary to the decision. Moreover the question as to the consideration to be given to the fact of conscription was not involved and was not discussed.[14]

The *Comas* case is also of scant help to respondent. That case also involved a naturalized citizen. The decision is from the court below whose decision is being challenged in the instant case. Moreover, the facts are vastly different. Appellant there had been indicted for

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[12]When the appellate cases mentioned are considered together with the trial court cases holding to the same effect (see p. 28 of Petitioner's Open Br. and p. 6, note 5 of his Reply Brief), it becomes apparent that the instant case is out of line with the over-all judicial view of the matter. See also *Kamada v. Dulles*, 145 F. Supp. 457 (DC ND Cal. 1956) (3 cases).

[13]8 USC 17, 34 Stat. 1228, carried over to 8 USC 804(a), 54 Stat. 1170, now in the law, slightly changed, at 8 USC 1484(a), 66 Stat. 269.

[14]This case too was before the decision in *Lehmann v. Acheson*, 206 F. 2d 592 (CA 3 1953).

murder in the United States and fled to Greece, his native country, under an assumed name and on a false passport, "thereby committing a second and third felony." (222 F. 2d at 332.) He further lied to the immigration authorities that he had never gone out of the United States, then he said he went to Greece to avoid prosecution in the United States and a few minutes later said that he did not leave the United States to avoid prosecution. The case, on the oath of allegiance phase, simply stands for the proposition that "these facts justify the district court in treating appellant's testimony as worthless." (222 F. 2d at 333.)[18]

As noted, the remaining cases discussed by respondent (Br. 25-28) all held for the citizen; all held that the conduct was involuntary. In its attempt to distinguish them, respondent contends (Br. 25) that there was always some significant factor bearing on duress in addition to the elements present in the instant case. This is a little different argument from that made by respondent at the previous oral argument where the contention was made that in all the appellate cases holding for the citizen, there had been a protest (articulated as we understand it) to induction.

The incorrectness of this latter argument is at once apparent. In *Mandoli v. Acheson*, 344 U. S. 133, the

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[18] It is interesting to note that even subsequent to the *Coumas* case, the same trial judge whose decision was affirmed in *Coumas* held that a plaintiff under facts not essentially different from those at bar had acted under duress, that the failure to protest the call to Japanese army service is no basis *per se* for a finding of expatriation and that plaintiff was not "able to exercise a free and reasonable choice with respect to his conscription." *Okada v. Dulles*, 134 F. Supp. 183 (N.D. Cal. 1955).

trial court's Finding of Fact Number 3 (Record in that case, No. 15, Oct. Term 1952, p. 23) was:

> "The plaintiff was inducted into the Italian Army from April 14, 1931 to September 5, 1931. He did not protest his induction into the army."

As seen (344 U. S. at 135), the Government confessed error on the point.

Moreover, in its brief in the *Mandeli* case (p. 10, foot note 3), the Government advised this Court that:

> "The Solicitor General did not authorize an appeal in *Tomasicchio v. Acheson*, 98 F. Supp. 166 (D.D.C., June 18, 1951)—where on facts essentially similar to those here, the trial court held that the claimant had not lost his American citizenship—because the District Court's ruling on this point was viewed as correct. . . ."[18]

In the *Tomasicchio* case, the court said (98 F. Supp. at 174):

> "The Government argues that the plaintiff was under a duty to protest against being drafted into the Italian army and not to submit without a contest. No doubt, however, a protest would have been futile and a refusal to take the oath would have been equally ineffective. The plaintiff might well have feared severe reprisals if he either protested or contested the order to respond to the draft. During the Fascist regime in Italy it would have been realistic to fear such an eventuality. The Government does not re-

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[18]True, it seems that the "this point" to which the Government's statement had reference was the point as to whether the Act of March 2, 1907 (34 Stat. 1228) required an election by a native born American citizen who also had the nationality of another country. However, the fact of record is that the Government took no appeal from the *Tomasicchio* decision which decision had squarely against it on the "no protest" point.

strict its solicitude to stout hearted men. The timid, the weak, and the ignorant are equally entitled to its protection. The law does not exact a crown of martyrdom as a condition of retaining citizenship."

The principles running through all the cases respondent seeks to distinguish from the case at bar "obliterates any factual distinction among them." *Girouard v. United States*, 328 U. S. 61, 63. They demonstrate that to apply its "harsh and technical doctrine" *Mandoli v. Acheson*, 344 U. S. 133, 138, in order to effectuate loss of citizenship in compulsory military service cases, the Government must show something more than passive conduct or lack of martyrdom on the part of the citizen.

Moreover, even the factual distinctions respondent seeks to make are not present.

As in *Dos Reiss ex rel. Camara v. Nicols*, 161 F. 2d 840 (CCA 1 1947), petitioner here was told by an employee at the American Embassy that the American Consulate could do nothing for a dual citizen with regard to service in the Japanese Army [R. 47, 48, 27]. In *Dos Reiss*, the citizen was told that the alternative to service in the Portuguese Army was a concentration camp; in the case at bar, petitioner had been told that those who sought to dodge the draft would be taken to prison and he heard of one case where a boy hid in a warehouse and was bayoneted and killed [R. 37].

In *Podea v. Acheson*, 179 F. 2d 306 (CA 2 1950), the element upon which respondent appears to rely is that appellant appeared at the American Consulate, before he was registered for military service and before he was called to report for service, and asked for a passport which was refused. In the instant case, however, peti-

tioner had a valid and existing passport [R. 39] at all times while he was in Japan and would have no reason to go and ask for another one or to renew it. He was inducted before his passport required any renewal [R. 18].

Respondent calls attention (Br. 24, n. 24) to the foot note dictum in *Doutrich v. Acheson*, 202 F. 2d 38, 41, n. 6 (CA 2 1953) to the effect that had the trial court found the conduct to have been voluntary "we would not have reversed such a finding as clearly erroneous." However, in the later cases of *Montalvo v. Dulles*, 210 F. 2d 700 (CA 2 1954) and *Angelillo v. Dulles*, 220 F. 2d 347 (CA 2 1955) when faced squarely with the issue, the Second Circuit did that very thing.

Respondent cannot claim support from *Lehmann v. Acheson*, 206 F. 2d 502 (CA 3 1953) where the Government's whole argument was based on the proposition that there, as here, the citizen made no protest and sought the aid of no one to avoid service in the Swiss Army. The same information that Lehmann had there as to the inability of the American Consulate to assist him was also present here [R. 47-48, 27]. Likewise does the Third Circuit's opinion *Stipa v. Dulles*, 233 F. 2d 551 (CA 3 1956) bolster petitioner's case, not respondent's, for it shows that the burden of proving voluntary conduct is upon the Government, a burden which it can in no wise, just as in *Stipa*, claim to have carried.

The later cases from the Court of Appeals from the District of Columbia (*Allata v. Dulles*, 221 F. 2d 52 [1955], *Soccodato v. Dulles* [1955], *De Marco v. Dulles*, 226 F. 2d 265 [1955], *Rocco v. Dulles*, 226 F. 2d 265, [1955], *Santi v. Dulles*, 226 F. 2d 266 [1955], *Bruni v. Dulles*, 235 F. 2d 855 [1956]), all holding that the trial

courts had erred in finding the conduct voluntary, show that that circuit's decision in *Acheson v. Maenza*, 202 F. 2d 453 (1953), is not to be interpreted, as respondent seems to suggest (Br. 20), as requiring protesting or seeking of aid to find ways to disobey the law as the price of not losing citizenship. In *Sagredato*, the Government urged that personal reasons (wanting to join the army because he was unemployed and had no way to support his wife and four children) showed that his service was voluntary. But the court rejected this argument, pointing out (220 F. 2d at 245) that:

> "... the fact is he was recalled under circumstances which placed legal pressure upon him to respond. His motives for desiring to re-enter the army do not alter the compulsive nature of the call."

Respondent has not suggested any point of difference between this case and *Hata*. Petitioner here had a valid existing passport and he was likewise not informed by anyone that he should protest.

* * *

Since the previous oral argument in this case, this Court has again had occasion to adjudge that conduct pursuant to the compulsion of law cannot be deemed voluntary. In *Halperin v. United States*, 353 U. S. 391 (reported sub. nom. *Grunewald v. United States*), this court held that a witness summoned to testify before a grand jury "was a compelled, and not a voluntary witness."[17]

[17] Other cases to the same effect are mentioned in our Opening Brief at page 19.

III.

Additional Reasons for Holding the Statute Unconstitutional as Applied.

In petitioner's Reply Brief (pp. 1-4) it was pointed out how lack of notice to the citizen that service in the Japanese Army was expatriating was an important element in the consideration as to whether citizenship can be taken away in this case. It was also argued (pp. 2-4) that *Savoranian v. United States*, 338 U. S. 491, was distinguishable from this case and also that doubt had been cast upon that case by this Court's decisions in *Moser v. United States*, 341 U. S. 41, 47, and *Kawakita v. United States*, 343 U. S. 717, 727. Certainly at the minimum those later cases mean that *Savoranian* must be confined and limited to its very narrow facts.

By reason of *Watkins v. United States*, 354 U. S. 178, decided by this Court subsequent to the previous oral argument herein, we suggest that the question of lack of notice in this case is worthy of further examination.

In the *Watkins* case this court reversed a conviction for contempt of Congress because nowhere, either in the Committee's charter, the statement of purpose of the questioning nor in the explanation as to the materiality of the particular questions, was it shown how the questions were pertinent to the matter under inquiry. This Court said, (354 U. S. at 208, 209) that a person called to answer questions before a Congressional committee "is entitled to have knowledge of the subject to which the interrogation is deemed pertinent." This is necessary because the witness, when asked a question, "must decide at the time the questions are propounded whether or not to answer" and if he judges wrong as to pertinency, even though in good faith, he will have been guilty of the crime. The require-

ment for knowledge of the subject is present therefore in order that a person who is required to make the choice, may indeed be in a position to make one.

The same rationale is present, we suggest, when it comes to conduct which may be expatriating, for expatriation may entail disabilities far greater than a jail sentence. If expatriation deals with, as we believe it does, a condition not only voluntarily entered into, but also one "with notice of the consequences," (*Mackenzie v. Hare*, 239 U. S. 299, 312) then it would seem clear that there was no such notice here. To apply the statute, therefore, to this case violates due process.

In his reply brief (p. 2) petitioner pointed out how he could not have known when he obtained his passport and left the United States in 1939 [R. 39] that he would be put to the choice in Japan between going into the Japanese Army and losing his citizenship. This is so because the law was not even in existence when he left; it was not passed until after he had been in Japan many months;[18] and it did not go into effect until even later[19] while he was still in Japan.

There is no showing, nor even a contention by respondent that after the law was passed petitioner knew or should have known that to avoid loss of citizenship, he was being put to a choice. The Government made no effort to introduce evidence that after the law was passed American authorities notified, or attempted to notify, petitioner or any American citizens in Japan of the law and to warn of the consequences of military service. It is

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[18] October 14, 1950 (54 Stat. 1168).

[19] January 12, 1941 (8 USC [1946 Ed.] 906).

therefore proper to assume that no such effort to give notice was made. In any event it is clear that petitioner had no knowledge of the consequences of his act. The trial court conceded [R. 57] that petitioner did not know his military service would result in loss of citizenship.

Accordingly, under the rationale of the *Watkins* case, to apply the expatriation statute to the facts of this case would violate due process. In effect, petitioner was caught in a trap, an unwitting one to be sure, but a trap, nevertheless. Expatriation cannot be decreed under such circumstances. (Cf. *Moser v. United States*, 341 U. S. 41.)

Conclusion.

The decision below should be reversed and petitioner declared to be a national and citizen of the United States.

Respectfully submitted,

A. L. Wirin,

Fred Okrand,

Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 415

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 235 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1956 (R. 76) and the petition for a writ of certiorari was filed on September 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

1. Whether, in an action for a declaration of citizenship, a dual national, who is alleged to have expatriated himself by serving in the armed forces of a

foreign nation, has the burden of proving that the foreign military service was under duress and meets such burden by proving that the service was under the foreign nation's conscription laws.

~~2. If the answer to the foregoing question is "no",~~

Whether the statute providing for expatriation by voluntary service in foreign armed forces is constitutional.

STATUTE INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provided in pertinent part:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. • • •

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, 8 U. S. C. (1946 ed.) 801 (e), provided in pertinent part:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

• • • • • •

(c) Entering or serving in the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state;

* * * * * *

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Ninth Circuit (R. 76) affirming the judgment of the District Court for the Southern District of California dismissing his action for a judgment declaring him to be a citizen of the United States. The trial court found that petitioner had expatriated himself under Section 401 (c) of the Nationality Act of 1940, *supra*, "by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan" (R. 12–13).

The evidence, other than documents, before the District Court consisted solely of petitioner's testimony. Petitioner was born in the United States at Artesia, California, on April 20, 1916 (R. 17). Until he was 23 years of age (R. 25), he lived in the United States and received his education in American schools (R. 18). In August 1939, following his graduation from the University of California with a degree in engineering (R. 46), he went to Japan in order to visit and study, intending to remain between two and five years (R. 26). At the time, he knew he was a national of Japan (R. 34) and that Japan was fighting in Manchuria (R. 25).

In Japan, petitioner began to study the Japanese language under a tutor (R. 35). When his father, a

resident of the United States (R. 29) who had paid his passage to Japan and was to finance his studies there, died in November 1939, leaving him without funds, he took a position with the Nakajuna Company, an aircraft manufacturer, in Ota City, Japan (R. 27).

About June 1940, pursuant to the Japanese compulsory military conscription law (R. 22–23), petitioner was required to take a physical examination (R. 18), and on March 4, 1941, pursuant to the same law, he was inducted into the Japanese army (R. 18). Between the time petitioner was notified to report for the physical examination and the time he actually entered the Japanese army, he made no effort to go to United States consular officials in Japan to tell them that he did not wish to serve in the Japanese army (R. 26–27). He also made no effort during this time to renounce his Japanese nationality, nor did he tell any Japanese official that he was an American citizen (R. 27).

When petitioner received notice to report to the Japanese army he did not protest (R. 30). He testified that he failed to protest his induction because rumors he had heard of Kempei Tei (police) brutality, which "might have been true", made him afraid to do so (R. 37). He explained his failure to go to an American consular office as based upon information received from a Nisei friend, employed at the embassy, that the American Consulate could not do anything for a dual-citizen Nisei (R. 43, 47–48). He also testified that at that time the Japanese police

were making monthly checks on his boarding house (R. 44).

Petitioner testified that he corresponded with his friends in the United States once a week (R. 28) and with his mother once every two weeks (R. 30), and that he met with Japanese friends who were American citizens (R. 28), but that he did not know that on September 16, 1940, the United States was drafting men into the United States army (R. 28, 30). He testified that he did not read any newspapers while in Japan (R. 29) and had no interest in Japanese national affairs (R. 47). He said that he knew England and France were then waging a war in Europe against Germany and Italy (R. 46), but did not know there was then a "cold" war between Japan and the United States (R. 46).

Petitioner testified that upon his induction into the Japanese army he was assigned to a training unit in Niwahuki for three or four months and was transferred to the 60th Air Force Regiment, also known as the 2378th Bomber Regiment, which was then in China, where he served until the end of the war (R. 30). After six months in China, he was transferred to French Indo-China, where he was at the time when war broke out with the United States (R. 32). After the fall of Singapore, he passed through there en route to the Philippines, where he arrived in February 1942 (R. 32). It was his duty in the bomber squadron to clean the fuselages of airplanes, to change sparkplugs and clean timers in airplane engines, and to do K. P. duty (R. 32-34). When Japan attacked

the United States, while petitioner was in Indo-China, he "told Japanese non-commissioned officers that "there wouldn't be any chance of Japan winning the war at all" (R. 37–38). The enlisted personnel of higher rank gave him a "thorough beating" that night and "for almost every day for a month" following, and on a couple of days a month thereafter (R. 38). While in the Japanese army he was nicknamed "America" (R. 38).

Petitioner was discharged from the Japanese army in August 1945. He went to the United States Consulate, on or about December 1, 1947, and applied for a passport to the United States (R. 19). About a year later, he received a Certificate of Loss of the Nationality of the United States, executed February 16, 1948, and approved by the Department of State on April 15, 1949 (R. 19–21).

On December 5, 1952, petitioner filed a complaint in the United States District Court for the Southern District of California against the Secretary of State for a decree adjudging him to be a citizen or a national of the United States (R. 3–5).[1] After a trial without a jury, the court found as a fact, *inter alia*, "VII. It is true that plaintiff's entry and service in the Japanese Armed Forces was his free and voluntary act", and entered a judgment that "Plaintiff has lost his United

[1] From the bench at the close of the trial, the court said in part (R. 55):

"Well, of course, the short answer to the entire argument, counsel, is that the court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony.

"He went to Japan when he was 25 years of age. He remained in Japan, and the entire world was in a turmoil all the time he was

States nationality, pursuant to Section 401 (c) of the Nationality Act of 1940, by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan" (R. 10-13).

DISCUSSION

1. Petitioner contends that the decision of the court below, requiring him "to show that his entry into the armed forces was involuntary" (Pet. App. A, p. 10; R. 73), is in conflict with rulings of the Courts of Appeals for the Second, Third and Seventh Circuits, which he interprets as putting on the government the burden of proving that the expatriating act was voluntary (Pet. 9).

(a). However, the cases upon which he relies (*Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3); *Angello* v. *Dulles*, 220 F. 2d 344 (C. A. 2); *Stipa* v. *Dulles*, 233 F. 2d 551 (C. A. 3); *Schiaber* v. *Secretary of*

---

in Japan. War is being waged in Europe. He is 23 years old. This isn't a case of a young boy that was taken to Japan in the early days like most of these cases, where a young boy was taken to Japan as an infant and he was reared in Japan and caught over there during the war and then was drafted into the service. Of course, there wasn't anything he could do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail.

"We don't have a situation like that. We have a young man who wasn't forced, in the first place, wasn't forced to go over to Japan, because he wasn't a child. He was 23 years old. He was a graduate from one of our greatest institutions of learning in this country with an engineering degree. And he went over there, and he knew he was registered over there in the family register, and he went over to do his duty as a Japanese national. That was the very purpose. That is why Congress enacted that legislation."

Stati, 175 F. 2d 492 (C. A. 7) ... reveal, upon critical analysis, that these circuits agree that the burden of proving duress to avoid the legal effects of an expatriating act rests upon the plaintiff dual-national who asserts it. In the *Lehmann* case, *supra*, the court twice adverted to the government's failure "to rebut the presumption that his entry and service in the Swiss Army as a result of conscription were involuntary", thereby impliedly acknowledging that the plaintiff had the burden (which the court found he met) of proving that his foreign military service was under duress and therefore involuntary. In *Angelo*, *supra*, the court recognized that the burden of proving duress to avoid expatriation, upon the taking of an oath of allegiance to a foreign monarch, rested upon the plaintiff when it stated that "the fact of the plaintiff's conscription into the Italian army was sufficient proof of duress to preclude a finding that his consequent taking of the oath was voluntary." Again, in *Stipa*, *supra*, though the court spoke generally of the heavy burden upon the government in expatriation cases, it recognized that duress was a defense to be established by the plaintiff and to be rebutted by the government. With the aid of judicial notice of economic conditions in post-war Italy, the court held that the plaintiff had met the burden of proving his defense of duress arising out of economic pressure.

The *Schiedt* case, *supra*, is inapposite to the problem of proving duress to avoid the expatriating act since it was not proved that the plaintiff had done anything which in law would expatriate her.

The rule as to burden of proof which most courts appear to follow, in cases where proof of the performance of the expatriating act is clear, was enunciated in *Perdoltee* v. *Acheson*, 202 F.2d 38, 40-41 (C.A. 2):

> "* * * The plaintiff has the burden of proving that he is a United States citizen. He made a *prima facie* case by alleging and proving his birth in New York. The Government then had the burden of showing that he had expatriated himself. This it did by proof of his oath of allegiance to the King of Italy. Presumptively this oath was voluntarily taken. He then had the burden of going forward with evidence to establish that it was taken under duress. * * *"

However, after the decision of this Court in *Gonzales* v. *Landon*, 350 U.S. 920, the Court of Appeals for the District of Columbia Circuit seems to have held that the burden of showing voluntariness rests with the Government. *Bogin* v. *United States*, decided July 25, 1956, Appendix, *infra*.

This rule on the burden of proof is in no way inconsistent with the rule of *Gonzales* v. *Landon*, 350 U.S. 920, that the standard of proof required in denaturalization cases is inapplicable to expatriation cases arising under Sec. 401(j) of the Nationality Act of 1940. That case involved expatriation by remaining outside the jurisdiction of the United States for the purpose of evading or avoiding military training and service, and the Court's holding was related to *the standard of proof necessary to establish the performance of the expatriating act*, which in that case included, by definition, the state of mind of the citizen. In cases such as the instant one, the expatriating act is objective, not involving by definition the subject's state of mind, and is usually not even controverted. Of course, if it is not admitted, it must be proved by clear and convincing evidence under *Gonzales*, *supra*. But the claim of duress in such cases is a matter of avoidance of the effect of the expatriating act, once it has been properly proved. *Gonzales* did not deal with that separate issue.

(b) With the exception of the recent *Brana* decision, *supra*, the divergence of views among the circuits in cases of expatriation arising out of military service in foreign armies appears to stem, not from conflicting opinions as to where the burden of proof lies, but from different views as to the quantum of proof necessary to show duress. The present status of the decisions is that the Courts of Appeals do not agree on the weight to be given to proof of conscription into the foreign military forces as establishing duress. The Second and Third Circuits have said that proof of conscription gives rise to a rebuttable presumption that the foreign military service was involuntary and casts upon the government the burden of rebutting it by proof that the service was in fact voluntary: *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3); *Perri* v. *Dulles*, 206 F. 2d 586 (C. A. 3); *Angello* v. *Dulles*, 220 F. 2d 344 (C. A. 2). On the other hand, the Ninth Circuit in this case (Pet. App. A), and the District of Columbia Circuit hold that there is no presumption that conscription alone rendered foreign military service involuntary, but that all the circumstances surrounding such service must be examined to determine the voluntariness of the plaintiff's action: *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.); *Mata* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.). And see the dissenting opinion in *Mandoli* v. *Acheson*, 344 U. S. 133, 139.

(c) The decisions of the different circuits are also in conflict on the weight to be given the plaintiff's "acts of omission," such as his failure to invoke the

assistance of American consular officers when faced with conscription, or his failure to protest to foreign authorities his induction into their armed forces in view of his claim to American citizenship. The Third Circuit has held that the plaintiff's failure to act is irrelevant to the question of the voluntariness of his service in the armed forces of a foreign state. *Lehmann* v. *Acheson*, 206 F. 2d 592; *Perri* v. *Dulles*, 206 F. 2d 586. The Ninth Circuit in this case (Pet. App. A) and the Second Circuit have ruled that the plaintiff's inaction is relevant as evidence of the voluntariness of his conscripted military service. *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2); *Angello* v. *Dulles*, 220 F. 2d 344 (C. A. 2).

(d). It is the position of the government that a plaintiff has the burden of proving that his expatriating service in a foreign army was involuntary and does not meet it or establish a *prima facie* showing of duress by showing simply that he was conscripted into the foreign army. Particularly, we think, he does not meet his burden where, as in this case, he was a dual national who had not been taken to the country of his other nationality as a minor and had not grown up there, but had gone abroad as an adult American.[4] The government also believes that all the circum-

[4] In *Mandoli* v. *Acheson*, 344 U. S. 133, the dual national had been taken to Italy as an infant, had grown up in Italy, and was inducted in a period of Fascist government. Neither that case nor the opinion of the Attorney General mentioned therein stand for the proposition that the mere fact of conscription in any country under any possible circumstances shows involuntariness *per se*.

stances, including acts of omission by the plaintiff, are admissible in evidence to show the character of the foreign military service."

But in view of the divergent views expressed among the circuits as to where the burden of proof lies and as to what constitutes voluntary service, we believe that the problem should be settled by this Court. It remains a question of importance, not only because cases continue to arise under the Nationality Act of 1940, but also because foreign military service by a person over 18 years continues to be a ground for loss of nationality under Section 349 (a) (3) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1481 (a) (3), and the conclusive presumption of voluntariness as to dual nationals created by subsection (b) of that section applies only to those who lived in the foreign state for a total of ten years before the expatriating act.

2. Petitioner also contends that, as applied here, Section 401 (c) of the Nationality Act of 1940 is unconstitutional in that Congress lacks power to provide for the expatriation of any person born in the United States, except perhaps through the voluntary acquisition of a new foreign nationality. "We think that the validity of Section 401 (c), properly interpreted as it was below, has now been established," but since there have been several attacks in recent years on the constitutionality of Section 401 (c) and

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[1] See the government's brief in *Gonzales v. Landon*, No. 111, Oct. Term, 1955, at pp. 42-62; *Mackenzie v. Hare*, 239 U. S. 299; *Savorgnan v. United States*, 338 U. S. 491.

related provisions of the expatriation statute, we do not oppose consideration of that issue if the Court should feel it is still open.

CONCLUSION

For the foregoing reasons, the government does not oppose the grant of certiorari in this case.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

OCTOBER 1956.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

No. 12348

FELICE BRUNI, APPELLANT

v.

JOHN FOSTER DULLES, APPELLEE

No. 12723

ANGELANTONIO SBROCCA, APPELLANT

v.

JOHN FOSTER DULLES, SECRETARY OF STATE, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided July 26, 1956

Mr. David Carliner, with whom *Mr. Jack Wasserman* was on the brief, for appellants. *Mr. Irving Tranen* entered an appearance for appellant in No. 12348.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, was on the brief, for appellee. *Messrs. Leo A. Rover*, United States Attorney at the time record was filed, and *Harold H. Greene*, Assistant United States Attorney, also entered appearances for appellee.

Before BAZELON, FAHY and BASTIAN, *Circuit Judges*.

PER CURIAM: These consolidated appeals are from orders[1] of the District Court holding that Bruni and Sbrocca had expatriated themselves. Both were born in Italy of fathers who were naturalized citizens of the United States. Thus, appellants were nationals of the United States and of Italy.

The cases were tried and decided in the District Court prior to the decision of the Supreme Court in *Gonzales* v. *Landon*, 350 U. S. 920, and prior to our decision in *Saccodato* v. *Dulles*, 96 U. S. App. D. C. 337, 226 F. 2d 243. In *Gonzales* the Supreme Court held that in expatriation cases arising under section 401 (j) of the Nationality Act of 1940, 54 Stat. 1137, as amended, 8 U. S. C. §§ 501 *et seq.* (1946),[2] the same strict standards of proof required for loss of citizenship by denaturalization apply; that is, the proof of expatriation must be "clear, unequivocal, and convincing." *Schneiderman* v. *United States*, 320 U. S. 118, 125. Expatriation is not to be proved by evidence which "leaves the issue in doubt," as we put it in *Acheson* v. *Maenza*, 92 U. S. App. D. C. 85, 88, 202 F. 2d 453, 456. We set forth the same criteria in *Saccodato*, where we also repeated what we had said in *Alata* v. *Dulles*, 95 U. S. App. D. C. 182, 184, 221 F. 2d 52, 54, that factual doubts in expatriation cases are

[1] In No. 12348, affecting Bruni, the action of the District Court is denominated an Order, in No. 12723, affecting Sbrocca, a Judgment. We use the terms interchangeably in this opinion.

[2] Although § 401 (j) has to do with expatriation by departing from or remaining outside the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the armed services, while these cases involve expatriation under other subsections of § 401, by taking an oath of allegiance to a foreign state, entering and serving in the armed forces of a foreign state, and voting in political elections in a foreign state, the same standards of proof must govern.

to be resolved in favor of citizenship. See, also, *Monaco* v. *Dulles*, 210 F. 2d 760 (2d Cir.); *Angelio* v. *Dulles*, 220 F. 2d 344 (2d Cir.); *Mandoli* v. *Acheson*, 344 U. S. 133; and the recent review of the subject in *Stipa* v. *Dulles*, — F. 2d — (3rd Cir.). All these decisions now make plain that when an American citizen is said to have expatriated himself, by joining the armed services of Italy, for example, or participating, after joining, in a mass swearing-of-allegiance, or voting in Italian political elections, the voluntary character of such acts must be proved under the strict standards above referred to, and that in determining voluntariness conscription or economic duress are relevant and important factors to be considered by the courts.

From the memoranda opinions of the District Court filed in these cases it appears that the criteria now established were not applied. Therefore, the orders will be reversed, and the findings and conclusions upon which they rest will be set aside. The cases will be remanded, however, for reconsideration, in the course of which the District Court in the exercise of a sound discretion may receive additional evidence should either party so request.

It is so ordered.

Office - Supreme Court, U.S.
FILED
MAR 29 1957
JOHN T. FEY, Clerk

No. ~~116~~ 19

In the Supreme Court of the United States

OCTOBER TERM, 1956

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 415

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 65-75) is reported at 235 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1956 (R. 76). The petition for a writ of certiorari was filed on September 13, 1956, and was granted on November 13, 1956 (R. 77; 352 U. S. 907). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an action for a declaration of citizenship, a dual-national who is alleged to have expatriated himself by serving in the armed forces

of a foreign nation has the burden of showing that the foreign military service was under duress, and whether he meets his burden merely by proving that the service was under the foreign nation's conscription laws.

2. Whether, as found by both courts below, petitioner's service in the Japanese army was not involuntary.

3. Whether Section 401 (c) of the Nationality Act of 1940, providing for the expatriation of a dual-national who voluntarily serves in the armed forces of his other country, is constitutional.

STATUTES INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provided in pertinent part:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, 8 U. S. C. (1946 ed.) 801 (c), provided in pertinent part:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by
>
> * * * * *
>
> (c) Entering or serving in the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state;
>
> * * * * *

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Ninth Circuit (R. 76) affirming the judgment of the District Court for the Southern District of California which dismissed his action for a judgment declaring him to be a citizen of the United States. The trial court found that petitioner had expatriated himself under Section 401 (c) of the Nationality Act of 1940, *supra*, "by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan * * *" (R. 12-13).

The evidence, other than documents, before the District Court consisted solely of petitioner's testimony. He was born in the United States at Artesia, California, on April 20, 1916 (R. 17). Until he was 23 years of age (R. 25), he lived in the United States and received his education in American schools (R. 18). In August 1939, following his graduation from the University of California with a degree in engineering (R. 46), he went to Japan in order to visit and study, intending to remain between two and five years (R. 26). At the time, he knew he was also a national of Japan whose name was in the family register there

(R. 34), and that Japan was fighting in Manchuria (R. 25).

In Japan, petitioner began to study the Japanese language under a tutor (R. 35). When his father, a resident of the United States (R. 29) who had paid his passage to Japan and was to finance his studies there, died in November, 1939, leaving him without funds, he took a position with the Nakajima Company, an aircraft manufacturer, in Ota City, Japan (R. 27).

About June 1940, pursuant to the Japanese compulsory military conscription law (R. 22-23), petitioner was required to take a physical examination (R. 18), and on March 1, 1941, under the same law, he was inducted into the Japanese army (R. 18). Between the time petitioner was notified to report for the physical examination and the time he actually entered the Japanese army, he made no effort to go to United States consular officials in Japan to tell them that he did not wish to serve in the Japanese army (R. 26-27), nor did he seek to return to the United States (R. 11). He also made no effort during this time to renounce his Japanese nationality, and he did not tell any Japanese official that he was an American citizen (R. 11-12, 27). Nor did he protest his induction into the army (R. 30). He testified that he failed to protest his induction because rumors he had heard of Kempi Tai (police) brutality, which "might have been true", made him afraid to do so (R. 37). He explained his failure to go to an American consular office as based upon information received from a Nisei friend, employed at the embassy, that the

American Consulate could not do anything for a dual-citizen Nisei (R. 43, 47-48). He also said that, at that time, the Japanese police were making monthly checks on his boarding house (R. 44).

Petitioner testified that he corresponded with his friends in the United States once a week (R. 28) and with his mother once every two weeks (R. 30), and that he met with Japanese friends who were American citizens (R. 28), but that he did not know that the United States was drafting men into the United States Army (R. 28, 30). He testified that he did not read any newspapers while in Japan (R. 29) and had no interest in Japanese national affairs (R. 47). He said that he knew England and France were then waging a war in Europe against Germany and Italy (R. 46), but did not know there was then a "cold" war between Japan and the United States (R. 46).

Petitioner testified that, upon his induction into the Japanese army, he was assigned to a training unit in Niwahuki for three or four months and was transferred to the 60th Air Force Regiment, also known as the 2378th Bomber Regiment, which was then in China (R. 30). After six months in China, he was transferred to French Indo-China, where he was at the time when war broke out with the United States (R. 32). After the fall of Singapore, he passed through there en route to the Philippines, where he arrived in February 1942 (R. 32). It was his duty in the bomber squadron to clean the fuselages of airplanes, to change sparkplugs and clean timers in air-

plane engines, and to do "kitchen police" duty (R. 32-34).

When Japan attacked the United States, while petitioner was in Indo-China, he said that he told Japanese non-commissioned officers that "there wouldn't be any chance of Japan winning the war at all" (R. 37-38). The enlisted personnel of higher rank gave him a "thorough beating" that night and "for about almost every day for a month" following, and on a couple of days a month thereafter (R. 38). While in the Japanese army, he was nicknamed "America", according to his testimony (R. 38).

Petitioner was discharged from the Japanese army in August 1945. He went to the United States Consulate, on or about December 1, 1947, and applied for a passport to the United States (R. 19). About a year later, he received a Certificate of Loss of the Nationality of the United States, executed February 16, 1948, and approved by the Department of State on April 15, 1949 (R. 19-21).

On December 5, 1952, petitioner filed a complaint in the United States District Court for the Southern District of California against the Secretary of State for a decree adjudging him to be a citizen or a national of the United States (R. 3-5). After a trial without a jury, the court found as a fact, *inter alia*, "VIII. It is true that plaintiff's entry and service in the Japanese Armed Forces was his free and voluntary act",[1] and entered a judgment that "Plaintiff

[1] From the bench at the close of the trial, the court said in (R. 55-58):

"Well, of course, the short answer to the entire argument,

has lost his United States nationality, pursuant to Section 401 (c) of the Nationality Act of 1940, by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan" (R. 10–13). Among the court's subsidiary findings were these: that petitioner journeyed to Japan, in August 1939, "knowing at that time that he was likely to be

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counsel, is that the court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony.

"He went to Japan when he was 23 years of age. He remained in Japan, and the entire world was in a turmoil all the time he was in Japan. War is being waged in Europe. He is 23 years old. This isn't a case of a young boy that was taken to Japan in the early days like most of these cases, where a young boy was taken to Japan as an infant and he was reared in Japan and caught over there during the war and then was drafted into the service. Of course, there wasn't anything he could do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail.

"We don't have a situation like that. We have a young man who wasn't forced, in the first place, wasn't forced to go over to Japan, because he wasn't a child. He was 23 years old. He was a graduate from one of our greatest institutions of learning in this country with an engineering degree. And he went over there, and he knew he was registered over there in the family register, and he went over to do his duty as a Japanese national. That was the very purpose. That is why Congress enacted that legislation.

"How ridiculous for me to believe his story that in the summer of 1940, when he was notified to report, that for a year he didn't do anything to leave Japan and didn't make any effort to leave Japan. He didn't go to see the American authority. And mind you, this is a university graduate. This isn't a young fellow that is confused and lost and doesn't know his way around. This is a university graduate. And because someone told him that the Kempi Tai would beat him up if he tried to get out or if he spoke to the Americans. He just refrained from protecting his rights as a citizen. He made no effort to return to this country. If it were a plot in the wildest sort of a television story it couldn't be believed, couldn't be accredited by anyone seeking the truth.

called for military service in the Japanese Armed Forces" (R. 11); that he made no effort to return to the United States, to avoid entry or service in the Japanese army, or to renounce his Japanese citizenship (R. 11–12); and that he did not protest his induction or attempt to communicate with Japanese or American officials (R. 11–12).

The court simply does not believe that testimony. That is all there is to the case.

"I believe this: He went into the service because he wanted to go into the service. I believe he went to Japan, and I believe that he waited for them to call him to the service, because under the laws of Japan that's the manner in which they took their men into the service under the draft laws, the conscription laws. That was their system of building up their armed forces. * * *

* * * * *

* * * All I am saying is that he went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. He went over there to serve his hitch in the army. He went over and he waited until they reached him on the draft, and when they did he was drafted. And that is what he was there for. And his service could not be considered involuntary. Reference has been made to 1940, and when he was notified in 1940 did he get out? Because then he was notified to report. And for a year between 1940 and 1941 he made no effort to get out. He made no effort to leave the country. We just happen to say 1940 because that is the time he said he was notified. But it isn't necessary to say 1940. The fact is that he, a university graduate, a man with that education, he must have known even before they told him, he must have known that they have armies and he must have known that they conscript men in those armies. He must have known, and he testifies that he knew, that he was registered in the family register over there. He knew, and he has testified he knew, he had dual nationality. He knew he was going to be drafted. So even before they notified him it was his turn he knew and he was waiting for it. He was waiting for that draft, for that call to serve. He made no effort to leave there.

* * * * *"

SUMMARY OF ARGUMENT

There is no question that petitioner's original United States citizenship was properly shown, and also that he served in the Japanese army while a Japanese national—conduct which Section 401 (c) of the Nationality Act of 1940 specifically designates as expatriating. The controversy centers on (a) the voluntariness of petitioner's service in the Japanese army, and the burden of proof on that issue of duress, and (b) the constitutional validity of Section 401 (c).

I

Our position is that, once the Government has proved (by clear and convincing evidence) that the citizen-claimant has performed an act of expatriation, the burden then shifts to him to make at least a *prima facie* showing of involuntariness; further, we contend that the ultimate burden of proof on the question of involuntariness rests on the citizenship-claimant, not on the Government. Petitioner, in our view, has met neither the initial burden of coming forward with evidence sufficient to make a *prima facie* showing of duress nor the ultimate burden of proof.

A. The burden of coming forward with evidence of duress is on the claimant. As in almost every other case of individual conduct—including the commission of criminal acts—the law presumes that the performance of a statutory act of expatriation (such as the act of joining the Japanese army in this case) is conscious and voluntary, and requires the person adversely affected by that presumption, who is in the best position to know whether the act was performed freely

or not, to initiate consideration of duress and to make an adequate *prima facie* showing. Unless that is done, the act must be considered voluntary. All the lower federal courts are in agreement on this fundamental proposition with respect to expatriation.[2]

B. Petitioner's only evidence bearing on duress which was believed by the trial court was that he was drafted into the Japanese army; he urges that this mere fact of conscription was enough of a *prima facie* showing to sustain his burden of coming forward. But conscription alone, without more, is not enough; the showing of involuntariness must appear from all the circumstances surrounding the foreign service. See this Court's orders of remand in *Murata* v. *Acheson*, 342 U. S. 900, and *Okimura* v. *Acheson*, 342 U. S. 899; and cf. *Mandoli* v. *Acheson*, 344 U. S. 133, 139–140 (dissenting opinion). When it enacted Section 401 (c) in 1940, Congress knew that conscription was the rule abroad, and it could not have intended to excuse foreign military service merely because it was performed in response to a draft notice.

Those called to foreign military duty can, and often do, show the involuntariness of this service by proof of protest to the foreign authorities or to American consular officials, or by attempts to return to this country, or by efforts to renounce the foreign nationality. Petitioner, a university graduate, did none of those things during the nine-months period (June 1940–March 1941) in which he knew he was going to

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[2] *Gonzales* v. *Landon*, 350 U. S. 920, did not deal with this issue, but solely with the burden of proof of the expatriating act itself, i. e., the service in the Japanese army.

be drafted. In fact, the trial court believed that he deliberately went to Japan in August 1939 (when he was 23 years old) knowing he would be called to service; and wishing to serve (R. 11, 56–57).

Those lower federal courts which have thought mere proof of conscription sufficient to show duress have mistakenly rested on the Attorney General's opinion in the *Panzica* case, 41 Op. Atty. Gen., No. 16, which dealt with the taking of an oath of allegiance to Italy by an Italian-American dual national who, after being brought up from infancy in Italy, was inducted into the Fascist Army in 1931 and then required to take the oath.[5] The Attorney General limited his ruling to that particular situation of a dual national already serving in the Fascist Army, and carefully indicated that the "surrounding circumstances" must always be considered. Petitioner's situation here is entirely different from that of *Panzica*; he was not already in service when he committed the expatriating act and the surrounding circumstances do not show that his entry into service was under duress.

On this view that petitioner did not sustain his burden of producing evidence of duress merely by showing that he was conscripted,[6] there is no need to reach the issue of ultimate burden of proof where

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[5] Service in a foreign army was not an act of expatriation before the Nationality Act of 1940, but the taking of a foreign oath of allegiance was made expatriating by the Act of March 2, 1907, 34 Stat. 1228.

[6] The trial court did not believe petitioner's other evidence as to duress, and these findings were affirmed by the Court of Appeals (*supra*, pp. 6–8).

the claimant does make a *prima facie* showing of involuntariness. Petitioner did not even reach that point.

C. If, however, proof of conscription is enough for a *prima facie* showing, the question of ultimate burden of proof is presented. In our view, that burden lies on the claimant.

1. The legislative history of Section 401 (c) supports this position. It reveals, with respect to voluntariness of service, that the State Department desired Congress to impose a *conclusive* presumption of voluntariness in all dual-nationality cases, while the Labor and Justice Departments, opposing the State Department proposal for a change in the bill, believed that the *claimant* should be permitted in all cases to establish duress, if he could. See *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 863-868 (C. A. 1). Moreover, the House Committee did not accept a proposal by an interested organization that the word "voluntarily" be inserted in Section 401 (c) (as well as in other subsections of Section 401) as an integral part of the expatriation act; and there are other indications that the general burden of proving his citizenship should be on the claimant.

In addition, Section 402 of the Act declares a presumption that any dual-national who remains for six months or longer in the country of his other nationality shall have expatriated himself under either Section 401 (c) or (d) (which concerns the taking of a foreign government post), "and such presumption shall exist until overcome * * *." This section creates a "rebuttable presumption of expatriation" (*Kawakita* v. *United States*, 343 U. S. 717, 730) which

can be overcome by proof by the claimant that he did not enter the foreign army or take a government job. Certainly, in a case like this where the claimant *did* enter the army, it is *a fortiori* that the burden is upon him to excuse that service, if he can, by showing that it was involuntary.

In sum, the legislative history and the structure of the Act show that proof of involuntariness is not a condition precedent to expatriation, to be proved by the Government; but rather a proviso or defense to be proved by the claimant.

2. This rule on the burden of proof of duress accords with that established in the land-grant and patent cases (from which the Court drew the standard of "clear and convincing" proof for denaturalization and expatriation cases), as well as in other, comparable, cases. The general principle is that the Government need not negative the existence of special facts which are within the knowledge or experience of the defendant or claimant; the burden is his to show that such facts exist.

D. Whatever the burden of proof as to duress, the voluntariness of petitioner's army service has been sufficiently established.

1. If petitioner has the ultimate burden of proof, he has clearly failed. The trial court and the Court of Appeals have held against him on his own evidence.

2. Even assuming that the Government has the burden, it has been borne here. The trial judge did not impose the burden on petitioner but simply disbelieved his protestations of fear, and found that he was willing to be drafted. The Court of Appeals af-

firmed those findings (R. 73–74). These two-court findings of fact are soundly grounded in the evidence, as the Statement shows, *supra*, pp. 3–8. Petitioner's whole course of conduct is diametrically opposed to his contention that his service was involuntary.

Petitioner attempts to bolster the record by certain materials, bearing on conditions in Japan, of which he asks the Court to take judicial notice although none of it was introduced at the trial by experienced counsel. Petitioner chose at the trial to stand on his own testimony, and cannot now retry the case. In any event, the general materials he now urges on the Court do not negative the specific conclusions drawn by the courts below from his personal testimony.

II

Our argument as to the validity of Section 401 (e) is set forth in our brief in *Perez* v. *Brownell*, No. 572, this Term. Petitioner seeks to avoid the constitutional issue by construing the section so as not to cover dual nationals, but this contention is obviously unavailing since the section, by its express terms (*supra*, p. 3), can cover *only* dual-nationals.

ARGUMENT

Introduction

A. The expatriating act in this case was petitioner's joining of the army of Japan, a foreign country of

[1] Although we suggest that the standard of proof of involuntariness (if the Government has the burden) should not be "clear and convincing evidence", but the preponderance of the evidence, we believe, as did the Court of Appeals, that the higher standard was met here.

which he was also a national. Such conduct was made to result in loss of American nationality by Section 401 of the Nationality Act of 1940, which provided:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (c) Entering or serving in the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state.*

It is common ground between the parties that (a) the expatriating act itself—the act of joining the Japanese army—must be proved by the Government

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* The comparable (but different) provision of the Immigration and Nationality Act of 1952 is Section 349, 8 U. S. C. 1481, which provides:

"(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by

* * * * *

"(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

* * * * *

"(b) Any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totalling ten years or more immediately prior to such act."

by clear, convincing, and unequivocal evidence (*Gonzales* v. *Landon*, 350 U. S. 920; cf. *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665), (b) this expatriating act must have been voluntarily performed (e. g., *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1); *Acheson* v. *Murakami*, 176 F. 2d 953 (C. A. 9)), and (c) it is immaterial that the petitioner may not have known that his entering the Japanese army would result in his expatriation (*Savorgnan* v. *United States*, 338 U. S. 491).

The controversy centers on the further issues of the burden and scope of proof of voluntariness, and the question of the validity of the statute. With respect to the burden and scope of proof of voluntariness, the problems are: (i) who has the burden of going forward with evidence of involuntariness, and the ultimate burden of proving it; (ii) if the Government has the burden of proof, must it prove voluntariness (as well as the performance of the expatriating act) by clear and convincing evidence; and (iii) if petitioner has the burden, does he satisfy it merely by showing that he was conscripted into the foreign army. Petitioner contends that the Ninth Circuit erred in holding that he had the burden of proving that his foreign military service was involuntary. Instead, he maintains that the Government must prove that his expatriating act was voluntary by clear and convincing evidence, and that, measured

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[1] The issue of the constitutionality of Section 401 (c) is similar to that presented in *Perez* v. *Brownell*, No. 572, this Term, and the Government's position on that question is set forth in its brief in No. 572. See *infra*, p. 50.

by this standard, there was a failure to prove voluntariness. It is the Government's position, on the other hand, that the question of voluntariness is one peculiarly within the knowledge of petitioner and that he must prove involuntariness by affirmative evidence of duress in order to avoid the effect of his expatriating act. It is also our view that petitioner did not make a *prima facie* showing of involuntariness, calling for rebuttal evidence by the Government, merely when he introduced evidence of conscription.

B. We deal at length, in the body of this brief, with these questions of the burden and scope of proof of voluntariness. At this point, it may be helpful to give a step-by-step analysis of petitioner's action, an analysis which will give a summary survey of the problems and indicate at each step the various positions (of the present parties, as well as of the lower federal courts in general) on burden and scope of proof:—

1. Petitioner brought an action for a judgment declaring him to be a citizen of the United States (R. 3-5). It is elementary that the burden of proof, in its primary sense, rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the termination of the action. Thus, petitioner had the general, over-all, burden of proving his citizenship. *Alata* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.); *Augello* v. *Dulles*, 220 F. 2d 344 (C. A. 2); *Monaco* v. *Dulles*, 210 F. 2d 760 (C. A. 2). As the first step in proving citizenship, petitioner made a *prima facie* case by showing his birth in California (R. 17). The Government then

had the burden of going forward with evidence in rebuttal of this *prima facie* proof of citizenship. Up to this point, there is no real problem.

2. In meeting its burden of going forward, the Government showed—indisputably, by clear, convincing, and unequivocal proof—that petitioner served in the Japanese army and that he was at that time also a Japanese national. Under Section 401 (c), that service is a specific act of expatriation. In our view, the Government fully sustained its burden of going forward at this point, and the next step was up to petitioner. So far as we are aware, there is universal agreement among the courts on this issue. The Court of Appeals for the Second Circuit stated the rule succinctly in *Pandolfo* v. *Acheson*, 202 F. 2d 38, 40–41, as follows:

> * * * The plaintiff has the burden of proving that he is a United States citizen. He made a *prima facie* case by alleging and proving his birth in New York. The Government then had the burden of showing that he had expatriated himself. This it did by proof of his oath of allegiance to the King of Italy. *Presumptively this oath was voluntarily taken.* He then had the burden of going forward with evidence to establish that it was taken under duress. * * * [Emphasis added.]

Petitioner, however, takes a different view. His theory is that "voluntariness" is an integral element of the expatriating act which the Government must fully prove in order to make out a *prima facie* case of expatriation. The answer is that this claim has no more legal justification than the assertion that the

prosecution has the initial burden of proving sanity in a homicide case. Even if the "case" were viewed as having been initiated by the Government in issuing the Certificate of Loss of Nationality (*supra*, p. 6), the result would be the same. The Government would have the primary burden of proving that petitioner performed an expatriating act. In showing foreign military service by clear and convincing evidence, the Government would make a *prima facie* case. Regardless of who the affirmative litigant may happen to be, it is our position (as well as that of all the lower federal courts) that, once the presumptively expatriating act has been proved, the citizenship-claimant must make a showing of involuntariness, as in any other case where the affirmative defense of duress is said to be involved.

3. The divergence of judicial views appears at the next step, in which the question arises as to the kind of evidence which will show duress and shift the burden of going forward with proof of voluntariness back to the Government. There are decisions which seem to hold that mere proof by the claimant that the foreign military service was pursuant to conscription is sufficient to make a *prima facie* defense of duress. However, the district judge, as the fact-finder in this case, ruled that conscription, as far as petitioner was concerned, did not show involuntariness. The Court of Appeals for the Ninth Circuit, as well as other federal courts, have considered this approach to be reasonable and correct. Our position, in accord with these courts, is that petitioner did not make a *prima facie* showing by merely proving his conscription.

The bare fact of entering the service today, in response to some form of universal military training, is of neutral import as to a particular individual unless other considerations give it evidential weight.

If we are correct in this view, the present case ends at this point. Petitioner proved no more than that he was drafted. The trial judge did not believe his other weak claims of duress (*supra*, pp. 6–8), and the Ninth Circuit has explicitly affirmed the trial findings (R. 73–74). If the bare fact of conscription is insufficient, petitioner did not make an adequate showing to overcome the presumption of the voluntariness of his expatriating act, and that expatriating act effectively negatives his claim to United States nationality.

4. Assuming, however, that petitioner's showing of conscription can be said to neutralize the presumption of voluntariness in performing the expatriating act, or at least to shift the burden of going forward with proof of voluntariness back to the Government, the question would then arise as to the ultimate burden of proof. Is it upon the Government, in the final analysis, to prove voluntariness, or upon the petitioner to prove involuntariness? The legislative history of Section 401 (c) shows that Congress intended foreign military service under the statute to be an expatriating act *unless petitioner shows his act to be involuntary, i. e.*, that the question of voluntariness is in the nature of a *proviso* rather than a *condition precedent* to expatriation. Hence, the ultimate burden rests on the claimant to show involuntariness and not on the Government to show a free choice. In this case, petitioner clearly did not meet that burden.

5. Finally, if petitioner is right and the full burden is on the Government, there is the question of whether the Government did prove in this case—and it so, by clear and convincing evidence—that petitioner voluntarily performed his expatriating act of joining the Japanese army.

In Point I, *infra*, pp. 21-30, we shall spell out our reasons for the Government's positions we have just outlined. Point II, *infra*, p. 30-51 refers to our brief in No. 572 for the argument on the constitutionality of Section 401 (e).

I. Petitioner has the burden of proving duress, if he wishes to avoid the effect of the statutory expatriating act of serving in the armed forces of a foreign state, and he has failed to sustain that burden

Since petitioner's citizenship by birth was properly proved, and there is also no question that he served in the Japanese army while a Japanese national (*supra*, pp. 3-4 (see Pet. Br. pp. 6-8)), we might stop with the claim that his military service was involuntary, the second step in the analysis given above in the Introduction (*supra*, p. 18).

A. Petitioner's expatriating act was presumptively voluntary and the Government did not have to come forward with evidence of voluntariness—the burden of coming forward was on petitioner.

Petitioner has the burden of going forward with evidence of involuntariness because, since the expatriating act has been proved by clear and convincing evidence as here, a presumption arises that the act was voluntary and petitioner must overcome that presumption by presenting some evidence of duress, if he wishes to avoid the effect of the statute. *Nishikawa* v. [illegible]

Dallas, 221 F. 2d 52, 54 (C. A. D. C.); *Vaquilla v. Dulles*, 220 F. 2d 344, 346 (C. A. 2); *Randolph v. Acheson*, 202 F. 2d 38, 40-41 (C. A. 2); *McGrath v. Nagle*, 186 F. 2d 209 (C. A. 9). There is no real dispute among the courts as to this proposition. The cases relied upon by petitioner (*Lehmann v. Acheson*, 206 F. 2d 302 (C. A. 3); *Vaquilla v. Dulles*, 220 F. 2d 344 (C. A. 2); *Stipa v. Dulles*, 233 F. 2d 551 (C. A. 3); *Nishikawa v. Dulles*, 125 F. 2d 402 (C. A. 7)) [illegible] that these circuits agree that the [illegible] forward with evidence sufficient to avoid the [illegible] effect of an [illegible] upon the plaintiff dual national [illegible]. In the *Lehmann* case, *supra*, pp. 307-308, the court noted [illegible] the Government [illegible] that the presumption that his entry and [illegible] the United States was a result of conservation [illegible] therefore impliedly acknowledged that the plaintiff met the burden which the court ruled he must meet to avoid that his foreign residence was motivated by the purpose and therefore involuntary. In *Stipa*, *supra*, p. 557, the court recognized that the [illegible] of showing duress to avoid expatriation [illegible] of an oath of allegiance to a foreign government rested upon the plaintiff when it stated that "the fact of the plaintiff's examination into the [illegible] duress to preclude a finding that the [illegible] taking of the oath was [illegible]." In *Nishikawa*, *supra*, though the court spoke generally of the heavy burden upon the Government in expatriation cases, it recognized that duress was a defense to be brought forward by the plaintiff

...ued to be returned to the Government. With the aid ... judicial notice of economic conditions in post-war Italy, the court held that the plaintiff had met the ... burden of proving by the preponderance of evidence ... economic pressure.

There is ... support ... the rule of these cases ... that there ... the ... of ... that the plaintiff ... the ... of ... of duress for some special ... Since, in ordinary ... the ... performed ... to ... and ... that ... voluntarily, ... the ... that ... charged ... the ... Court in *Duress*, ... 180, ... that ... would ... affirmative ... of the ... mentioned. But a ... ... and ... *Battle v. United States*, ... 30, 38; *Holmes v. United States*, ... 441. The ... to use the ... that ... was ... at the ... of the ... *United States*, 227 ... 40, 54). Similarly, there is a presumption in the ... courts that ... are voluntary and ... to be ... by the defendant ... of proving ... was not proved ... that the plaintiff ... would ... payments.

who made the confession." *Wilson v. United States*, 162 U. S. 613, 622. *Ah Yuk Chung v. United States*, 91 F. 2d 805, 806 (C. A. 9); *Murphy v. United States*, 280 Fed. 801, 808 (C. A. 7). The burden is not upon the Government initially to show its voluntary character. *Brady v. United States*, 224 F. 2d 348 (C. A. 6); *Gray v. United States*, 9 F. 2d 337, 339 (C. A. 9). As Wigmore states: "This is the practical and natural rule; for (1) there is any reason to object to the confession, he can always do better than the defendant" (8 Wigmore, Evidence, § 2067 (3d ed.)).

In general, the law reasonably assesses that proscribed conduct producing volition is not done under duress. (See) that it is done voluntarily. This presumption is implicit in the concept that duress is an affirmative defense. Rule 8 (c), F. R. Civ. P.), since there would be no reason for going forward with affirmative evidence of duress unless it were to rebut a presumption of voluntariness. Most human acts are done voluntarily in the reasonable exercise of free will, and it is well recognized the matter would be peculiarly within the knowledge of the one coerced. There is no reason why that general principle should not apply [illegible] the performance of an act of expatriation.

Gonzales v. Landon, 350 U. S. 920, did not hold to the contrary. That case involved the burden of proof of the expatriating act itself, not the burden of proof, or the burden of going forward with evidence of some kind, of duress which is alleged to avoid the effect of the expatriating act, once that act has been properly proved. See *supra*, pp. 44-45; R. 74-75.

B. All the circumstances surrounding foreign military service must be considered in determining voluntariness, and the mere fact of conscription—which is all that petitioner showed—is insufficient to establish a *prima facie* defense of involuntariness.

Here, although petitioner's argument is that he could have prevailed without presenting any evidence on duress, because the burden of making a *prima facie* showing of voluntariness was on the Government (*supra*, pp. 18-19), the fact is that he did bring forward some evidence bearing on involuntariness, evidence believed by the trial court. The evidence was the proof that he was drafted into the Japanese army. Petitioner argues that this was sufficient for a *prima facie* showing of duress, and in this he appears to be supported by the Second and Third Circuits (*Angilla* v. *Dulles*, 220 F. 2d 344 (C. A. 2); *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3); *Perri* v. *Dulles*, 206 F. 2d 586 (C. A. 3)).[1] We agree, on the other hand, with the courts below (and with other courts) that induction into foreign military service under a conscription law is, standing alone, insufficient to establish involuntariness of service under the Nationality Act of 1940. *Mata* v. *Dulles*, 221 F. 2d 52, 55 (C. A. D. C.); *Acheson* v. *Maenza*, 202 F. 2d 453, 457-458 (C. A. D. C.); see also the dissenting opinion in *Mandoli* v. *Acheson*, 344 U. S. 133, 139-140.

1. In our view, all the surrounding circumstances, and the reasonable inferences to be drawn therefrom,

[1] The rest of petitioner's testimony as to duress (*supra*, pp. 4-5) was not credited by the trial court. See *supra*, pp. 6-8; *infra*, pp. 45-48.

must be considered in determining whether a call to arms was answered voluntarily or involuntarily. See *Mitsuta* v. *Acheson*, 342 U. S. 900 and *Okimura* v. *Acheson*, 342 U. S. 898, where the Court worded its orders of remand in those general terms. In holding that duress cannot be inferred from the mere fact of conscription, the Court of Appeals in the *Mitsuta* case, *supra*, said:

> To follow appellee's view would be largely to nullify the Congressional mandate, for it is an undeniable fact that today military service pursuant to a system of conscription or some variant of universal military training is the rule rather than the exception in almost all foreign countries. Consequently, were we to espouse the theory urged upon us by appellee, no one except only those few whose voluntary enlistment could be proved and those serving in the comparatively rare units comparable to our National Guard would fall within the ambit of Section 401 (e). Congress cannot have intended to permit almost every foreign serviceman to escape the impact of the statute. Moreover, there can be no doubt that military service is frequently performed willingly, freely, even voluntarily, although technically there is no enlistment but conscription under a "compulsory" service law. We are not ready to believe that everyone inducted into an army, a navy, or an air force, performs his service solely because of the proximity of the court martial or the police station. Duress cannot be inferred from the mere fact of conscription.

Similarly, the court in *Hamamoto* v. *Acheson*, 98 F. Supp. 904, 905 (S. D. Cal.), stated:

> To accept that reasoning is to defeat the Congressional design to discourage dual nationality which is implicit in the statute. Can we believe that Congress intended the Act to be ineffective with relation to foreign states that followed a policy of conscription in the recruitment of their armies? Can we say that the hundreds of thousands of United States servicemen who were conscripted and served during the last war were involuntarily forced into the service under duress? On the contrary, when they answered the call to arms *without resistance* their action was voluntary and this included those who did not view the prospect of army life with relish as well as those imbued with the zeal of patriotism.

Entering the service in response to some form of universal military training should be of neutral import as to a particular individual, unless other considerations give it evidential weight.

Petitioner's argument, in this connection, that evidence of failure to seek relief from service is incompetent seems unsubstantial. Failure to seek the assistance of American consular officers when faced with conscription, or failure to protest induction to foreign authorities, should be considered as relevant to the general question of voluntariness of service by one who claims American citizenship. *Angelio* v. *Dulles*, 220 F. 2d 344 (C. A. 2); *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2). Efforts by American dual

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The Court of Appeals for the Third Circuit has considered such "acts of omission" irrelevant on the question of voluntariness. See *Lehmann* v. *Acheson*, 206 F. 2d 392 (C. A. 3), discussed *infra*, pp. 29, 34.

nationals to obtain consular intervention, or to avoid foreign service, by coming to this country, have often been considered competent evidence indicating involuntariness (cf. *Mandoli* v. *Acheson*, 344 U. S. 133; *Veta* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.); *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.); *Dos Reis* v. *Wells*, 461 F. 2d 800 (C. A. 1)). By the same token, the converse should be true; petitioner, an educated man, would logically have gone to the American consulate, in 1940 or early 1941, if he really wished to avoid Japanese military service, or he would have sought some relief from the Japanese authorities.[1]

The fact that reliance is placed on "inaction" does not render such evidence irrelevant. Inaction often has a direct bearing on expatriation. The letter of submittal to the President from the Cabinet Committee which made the original draft of the 1940 Act (Hearings before the Committee on Immigration and Naturalization, House Committee Print, p. 608, 76th Cong., 1st Sess.) stated:

> None of the various provisions in the Code concerning loss of American nationality * * * is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, *or inaction*, show that their real attachment is to the foreign country and not to the United States. [Emphasis added.]

[1] We repeat that the trial court disbelieved petitioner's explanations as to why he did not seek relief from the Japanese authorities or ask for American intervention. *Supra*, pp. 6 n. 25. The Court of Appeals confirmed those findings (R. 73, 74).

When one enters the army of a foreign state without protest, either to the foreign government or to the United States, it may reasonably be inferred that his service is voluntary, and that his sense of duty attaches to the foreign government rather than to the United States, particularly when there are added factors as in this case. See *infra*, pp. 31–32, 45–48.

2. The Second Circuit, in *Augello* v. *Dulles*, 220 F. 2d 344, and the Third Circuit, in *Lehmann* v. *Acheson*, 206 F. 2d 592, and *Perri* v. *Dulles*, 206 F. 2d 586, have considered conscription, in itself, as creating a sufficient presumption of involuntariness. *Augello* and *Perri* involved expatriation for taking an oath to the King of Italy by Italian dual-nationals as a concomitant of their military service. The *Lehmann* case involved conscription into the Swiss army. The courts in all three cases, however, rested on 41 Op. Atty. Gen., Op. No. 16, in support of their conclusion. The opinion of the Attorney General referred to an Italian dual-national named Panzica who was taken to Italy in 1910 when he was 9 years old. He grew up in Italy and was inducted in 1931, under the Fascist regime, for six months' service under a universal military training program. Foreign military service was not an expatriating act until after the Nationality Act of 1940 became effective, and the Government sought to expatriate Panzica for taking an oath of allegiance to the King of Italy after he had been conscripted in 1931. Section 2 of the Act of March 2, 1907 (34 Stat. 1228) made the taking of such an oath an expatriating act.

The ruling of the Attorney General was restricted in application to the *Panzica* case. He stated:

> In my opinion, the choice of *taking the oath* or violating the law was, *for a soldier in the army of Fascist Italy*, no choice at all. Mr. Panzica's oath can only be regarded as having been taken under legal compulsion amounting to duress. [Emphasis added.]

Panzica was already a soldier, and the expatriating act was the taking of an oath of allegiance. There is a significant distinction between the duress placed upon one already a soldier to take the oath after he has been subjected to military authority and has no alternative but to submit, and the case of an American citizen threatened with conscription but who could still seek and perhaps obtain aid from the Government of the United States. In 1931, at the time of the alleged expatriating act in the *Panzica* case, foreign military service did not expatriate. It was only when an oath was taken that one could be expatriated, and it would be virtually impossible for our Government to obtain an exception for a dual-national from taking an oath in the foreign army of his other country into which he had already been inducted.

Moreover, the opinion of the Attorney General continues:

> I do not mean to say that military service or the taking of an oath of allegiance, when performed in compliance with the law of a foreign country, can never constitute an act of expatriation. Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to ac-

> complish expatriation. However, the surrounding circumstances may show a genuine desire to serve and to adhere to the foreign country, rather than mere submission to its laws. Suffice it to say that there is no indication of any such desire in Mr. Panzica's record. Accordingly, it is my opinion that Mr. Panzica did not lose his United States citizenship by virtue of having taken the oath of allegiance to the King of Italy in 1931.

Thus, the opinion was oriented specifically around the facts of the *Panzica* case, and is not an authority for the broad proposition that conscription alone establishes a presumption of involuntariness. On the contrary, the opinion expressly takes into consideration the fact that circumstances surrounding one's induction may determine whether or not conscription is indicative of duress. At most, the ruling may establish such a presumption where the dual-national had grown up in the foreign country where all his home ties were, and, as a practical matter, he had no alternative but to submit to induction, as in Fascist Italy. But it has no bearing on the very different facts of a case such as this.

3. In this case, a dual-national grew up in the United States, received a college education here, and then went voluntarily, as an adult, to the foreign country when he was of draft age, knowing his name was in the family register there and that he was a national of that foreign country, which was then engaged in military conflict and was conscripting soldiers. The trial court even found that he knew "he was likely to be called for military service" when

he went to Japan" (R. 11). From the time (June 1940) when he received his draft notice until he was inducted (March 1941), he made no effort at all to be relieved from service or to seek help from the American authorities, nor did he seek to return to this country. Even in a totalitarian state, involuntariness should not be assumed from the mere fact of conscription in a case like this, particularly when there is no indication of any attempt to avoid foreign conscription. In 40 Op. Atty. Gen. 553, 554, Attorney General Clark pointed out that each case must be considered in the light of its own facts and circumstances. He also referred to involuntary service as comprising a situation where "avoidance thereof is not within the power of the individual". Petitioner voluntarily subjected himself to the foreign draft law, and there was no showing that he could *not* have avoided service if he had tried. In fact, the trial court thought that he wished to serve (*supra*, p. 8, fn. 1; R. 56–57)."

In sum, the mere fact of conscription—which is all that petitioner can now properly call to his support (see *supra*, p. 25)—is insufficient to sustain his burden of producing evidence of duress to overcome the presumption of voluntariness in his performance

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[14] Petitioner frequently cites *Kawakita* v. *United States*, 343 U. S. 717, (Pet. Br. 19, 34, 36, 37, 44), but Kawakita never served in the Japanese armed forces (see 343 U. S. at 727–728) and his case is not at all analogous to petitioner's. Moreover, the issue of expatriation in Kawakita's case arose in the context of a criminal trial, and the Government therefore proved (as the jury specifically found) all the relevant factors beyond a reasonable doubt.

of the expatriating act. He simply failed to make a *prima facie* showing of duress. Consequently, there was no need for the Government to come forward with evidence of voluntariness in rebuttal; the case stood as if petitioner had not controverted, or sought to explain, his performance of the expatriating act. On this view, there is no need to reach the issue of the ultimate burden of proof (as distinguished from the burden of going forward with evidence of duress). The ruling below can rest simply on the proposition that the expatriating act, proved by clear and convincing evidence (and indeed admitted), has not been adequately challenged.[7]

C. The ultimate burden of proving the involuntariness of the expatriating act rests on the person claiming citizenship

If petitioner's evidence of duress can be said to be sufficient to sustain his burden of coming forward with a showing of duress—and thereby to neutralize

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[7] It is clear that, even if the ultimate burden of proof (with respect to duress) is on the Government, the decision must go against petitioner if his evidence in support of the claim of duress is insufficient to carry his burden of coming forward with adequate proof to make a *prima facie* case of duress. Cf. *Davis* v. *United States*, 160 U. S. 469, in which evidence had been introduced to rebut the presumption that the defendant was sane, and no evidence was introduced by the prosecution in support of the presumption; the question considered in the opinion was whether the defendant must rebut the presumption by a preponderance of the evidence or merely by creating a reasonable doubt; and the court chose the latter alternative; but the underlying assumptions are that the question is one for the jury to decide, though the only evidence for the jury to consider be evidence contradicting the presumption, and that the jury can competently decide, in the face of such evidence, that the defendant is sane. The *Davis* decision was followed in *Matheson* v. *United States*, 227 U. S. 540.

the presumption of voluntariness as to his foreign military service—the question would then arise as to where the ultimate burden of proof lies. Is it like the issue of sanity in a criminal case where the ultimate burden of proof never shifts, *i. e.*, where, when there is a sufficient showing of insanity to take that issue to the jury, the Government must prove sanity? And if so, is the "strict standard" of "clear and convincing" evidence applicable?[18] Or does the burden rest on the claimant to avoid the effect of the expatriating act by proof that it was involuntarily performed? We think that the legislative history clearly shows that Congress intended the burden of proof to rest on the claimant, that voluntariness of foreign military service was not made a condition precedent to expatriation, but rather that involuntariness was made a *proviso* which, if established by the claimant, would take his particular case out of the statute.

H. R. 6127, 76th Cong., 1st Sess., was introduced into the House of Representatives on May 3, 1939. It was referred to the Committee on Immigration and Naturalization which gave it lengthy consideration. In the course of the hearings, Mr. Richard W. Fluornoy, Assistant Legal Adviser of the State Department, proposed a proviso to Section 401 (c) directing that there be a *conclusive* presumption of voluntariness in all cases of dual nationality. In

[18] *Bruni* v. *Dulles*, 235 F. 2d 855 (C. A. D. C.), so holds with respect to expatriation. The other decisions which regard conscription as enough to show involuntariness are not clear, since there was no real need in those cases to reach this question of ultimate burden of proof.

other words, he wished the subsection to be changed so that all dual nationals would forfeit American citizenship whether the service in the foreign army was voluntary or involuntary. No further reference to this proposed amendment was made in either the Senate or the House, but it was strongly opposed by the representative of the Labor Department who was present at the hearing. He objected to making the presumption conclusive and maintained that, in all cases, the American citizen should be *permitted to establish* that his service in the foreign army was in fact not voluntary; the representative of the Department of Justice concurred with this view. See Hearings before the Committee on Immigration and Naturalization on H. R. 6127, House Committee Print, pp. 149–156, 168–170, 200–203, 76th Cong., 1st Sess.; *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 863–868 (C. A. 1). For present purposes, the significance of the view of the Departments of Justice and Labor was that, under the new Act, the citizenship-claimant was to be permitted to establish duress, if he could; the Government was not to be put to the task of disproving duress.

During the same committee hearings, Mr. Henry F. Butler, representing the National Council on Naturalization and Citizenship, urged that the word "voluntarily" be inserted in proposed subsections (b) through (g) of Section 401 for the purpose of excluding persons who involuntarily entered or served in foreign armies. The Committee did not insert the word in any of the subsections. See Hearings before the Committee on Immigration and Natural-

ization, House Committee Print, pp. 397–403, 76th Cong., 1st Sess. Since it was intended that Section 401 (c) apply only to cases of voluntary service (see *Dos Reis* v. *Nicolls*, *supra*), the significance of the Committee's failure to insert the word "voluntary" in the statute seems to be this: if "voluntary" were actually made an integral part of the expatriating clause of the statute, it might be contended (as petitioner contends here, Pet. Br. 10) that voluntariness is a condition precedent to expatriation, and hence must ultimately be proved by the Government. Instead, when the issue was squarely presented for consideration, the insertion of the word in the statute was rejected.

Subsequently, several amendments, not part of the original draft code, were proposed to the 1940 Act. Among them was Section 503, 8 U. S. C. (1946 ed.) 903, under which petitioner in this case instituted his action. H. Rep. No. 3019, 76th Cong., 3d Sess.; 86 Cong. Rec. 12818, 13183, 13244 (Sen. Amend. No. 5 to H. R. 9980, which superseded H. R. 6127, *supra*). When Section 503 came before the House, it, along with the other amendments, engendered considerable discussion. 86 Cong. Rec. 13247–13248, 13250. Answering questions concerning the purpose and operation of the amendments, Mr. Rees, a member of the Committee on Immigration and Naturalization and one of the House Conference Members who submitted H. Rep. No. 3019, *supra*, stated flatly, "In this act we put the burden of proof upon that individual to show that he is a citizen or a national of the United States." 86 Cong. Rec. 13248.

Further reason for holding that involuntariness is a proviso or defense which the claimant must establish appears from Section 402 of the Nationality Act of 1940, 8 U. S. C. (1946 ed.) 802, which provides (as it appears in the U. S. Code):

> A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801 of this title, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * *and such presumption shall exist until overcome, whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence* to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe * * *. [Emphasis added.]

Section 402 does not enlarge upon the substantive requirements of Section 401 (c), but the force of Section 402 is not spent unless petitioner shows he was not expatriated under Section 401 (c) or (d). *Kawakita* v. *United States*, 343 U. S. 717, 730. What the section says is that a "rebuttable presumption of expatriation" (343 U. S. at 730) arises if the national stays in the foreign state six months or longer, since it is assumed that he either served in the armed forces of the foreign state (401 (c)) or took a government job for which only a national of that state could qualify (401 (d)). This presumption can be over-

come, of course, by proof that the claimant did not enter the foreign army or take a government job, but until proof is made, the presumption of expatriation "shall exist". And it is crystal clear that the section places the burden of proof upon the claimant.

When a person, like petitioner, has actually served in a foreign army, the force of Section 402 is obviously not spent; the presumption of expatriation remains, or, rather, would become even stronger since the claimant has actually performed an act of expatriation referred to in Section 402. Under that provision, it will continue to be presumed until the presumption is "overcome"—that petitioner has met all the requirements of Section 401 (e), including the fact that he performed his act of expatriation voluntarily. To overcome this continuing presumption under Section 402, the claimant would then have to prove duress or some other factor in avoidance of expatriation by affirmative evidence. Again, the terms and structure of Section 402 plainly shows that the burden of "overcoming" the presumption would be his.

Section 402 thus has a direct bearing on petitioner's burden of proof, since his case falls squarely within that Section. But the section also has a wider bear-

It is significant to note that Section 352 (a) (1) of the Immigration and Nationality Act of 1952, 8 U.S.C. (1952 Ed.) Supp. V, p. 1, which replaced Section 401 (e) of the 1940 Act, spells out a conclusive presumption of voluntariness on the part of a dual national who acquires the citizenship of the foreign state if he had resided in that state an aggregate of ten years or more immediately prior to his acquisition. Since such was the intent of Congress in 1952, the existence of a much less drastic *rebuttable* presumption in the 1940 Act seems reasonable. As for the 1952

ing on the issue of burden of proof of duress as a defense to expatriation, in general. Congress has indicated in this provision—as in the other materials to which we have referred (*supra*, pp. 34-36)—that it is not averse to placing burdens of proof upon the citizenship claimant. The expatriation provisions of the Nationality Act of 1940 are not instinct with the assumption that the Government must affirmatively prove every facet and factor in a case of loss of nationality; rather, the statute recognizes throughout that the claimant has serious burdens of proof which he must shoulder. Cf. *McGrath* v. *Abo*, 186 F. 2d 766, 774 (C. A. 9).

2. The rule of burden of proof of duress which we urge should be applied here is that laid down in relation to affirmative defenses in land grant and patent cases, as well as announced in other comparable rulings. The land grant and patent decisions are particularly applicable because they require the same "clear, unequivocal and convincing" standard of proof required in denaturalization and expatriation cases. *Maxwell Land Grant Case*, 121 U. S. 325, 380-381. See *Gonzales* v. *Landon*, 350 U. S. 920; *Schneiderman* v. *United States*, 320 U. S. 118, 125. In *Wright Blodgett Co.* v. *United States*, 236 U. S. 397, appellant made an argument similar to the one petitioner makes here. On pages 402-403, 405, this Court said:

> * * * In substance, the argument comes to this: that in a suit by the United States to cancel a patent upon the ground of fraud,

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Act, it would not seem logical that Congress intended to presumption of voluntariness to exist at all up until the time the conclusive presumption would become operative.

> where the land is held by a grantee of the entryman, the Government must establish that the grantee is not a *bona fide* purchaser for value; that this must be shown by proof of a clear and cogent character; and that, measured by this standard, the Government's case was not made out. * * * In such case, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction. [Citations] And, despite satisfactory proof of fraud in obtaining the patent, as the legal title has passed, *bona fide* purchase for value is a perfect defense. [Citations] *But this is an affirmative defense which the grantee must establish in order to defeat the Government's right to the cancellation of the conveyance.* * *. [Emphasis added.]

The same rationale has found cogent expression in other cases decided by this Court. In *United States v. Fleischman*, 339 U. S. 349, the House Committee on Un-American Activities issued subpoenas to each of the members of the executive board of an association which was under investigation. The Court held, *inter alia*, that, after introducing evidence that the executive board had power to produce the records and that it had not done so, the Government did not have the further burden of proving that each individual member had not done that which was within his power to bring about compliance with the Committee's order, but that the board members must advance excuses for

nonaction as defensive matter. The Court said, on pages 360–361:

> We think that the circumstances of this case fairly bring into play the familiar doctrine in criminal cases that "it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." *Rossi* v. *United States*, 289 U. S. 89, 91–92 (1933), and authorities cited. The considerations that govern this question have been well stated by Mr. Justice Cardozo in discussing a similar question the constitutionality of a statute which shifted the burden of proof in a criminal prosecution to the defendant.

The Cardozo opinion referred to in the *Fleischman* case was *Morrison* v. *California*, 291 U. S. 82, in which this Court reversed a conviction under Section 9a of the California Land Law as lacking in due process. Under California law, an alien who was neither a citizen or eligible for naturalization (with certain exceptions) could not occupy land for agricultural purposes. Section 9a provided that if an indictment alleged alienage, the burden of proving citizenship was on the defendant. In holding Section 9a invalid, this Court distinguished it from another section of the California Land Law previously held valid, saying (pp. 87–91):

> This court in *Morrison* v. *California*, 288 U. S. 591, passed upon a controversy as to the

validity of § 9b of the California Land Law, which although akin to § 9a, has important elements of difference. This section (9b) provides in substance that when it has been proved that the defendant has been in the use or occupation of real property and when it has also been proved that he is a member of a race ineligible for citizenship under the naturalization laws of the United States, the defendant shall have the burden of proving citizenship as a defense. We sustained that enactment when challenged as invalid under the Fourteenth Amendment of the federal constitution. The state had given evidence with reference to the defendant, the occupant of the land, that by reason of his race he was ineligible to be made a citizen. With this evidence present, we held that the burden was his to show that by reason of his birth he was a citizen already, and thus to bring himself within a rule which has the effect of an exception. In the vast majority of cases, he could do this without trouble if his claim of citizenship was honest. The People, on the other hand, would be relatively helpless. In all likelihood his life history would be known only to himself and at time to relatives or intimates unwilling to speak against him.

The ruling was not novel. The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of

convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, Vol. 5, §§ 2486, 2512 and cases cited. *Special reasons are at hand to make the change permissible when citizenship vel non is the issue to be determined.* Citizenship is a privilege not due of common right. One who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good. In accord with that view are decisions of this court in proceedings under the acts of Congress for the deportation of aliens. A Chinaman by race resisted deportation on the ground that, though a Chinaman, he had been born in the United States. The ruling was that as to the place of birth the burden was upon the alien, and not upon the Government. The ruling also was that the imposition of that burden did not deprive the alien of his constitutional immunities. *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200. * * *

* * * For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance [citing cases], or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, § 79. The list is not exhaustive. Other instances may have arisen or may develop in the future where

> the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in [the] last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises. [Emphasis added.]

See also *Schlemmer* v. *Buffalo, Rochester, etc. Ry.*, 205 U. S. 1, 10, where the court applied the "general rule" that a proviso must be set up and proved by the party relying on it.

3. This rule as to burden of proof in no way runs counter to *Gonzales* v. *Landon*, 350 U. S. 920, which held that the standard of proof required in denaturalization cases applies to expatriation case arising under Section 401 (j) of the Nationality Act of 1940 (added by the Act of September 27, 1944, 58 Stat. 746). That case involved expatriation by remaining outside the jurisdiction of the United States for the "purpose of evading or avoiding" military training and service, and the Court's ruling related to *the standard of proof necessary to establish the performance of the expatriating act*, which in that case included, by definition, the state of mind of the citizen, *i. e.*, his purpose. Under Section 401 (c), the expatriating act is objectively defined, and there is no doubt that here the expatriating act was established by clear and convincing evidence since petitioner pleaded it in the complaint (R. 4) and the Government admitted it in the answer (R. 6). Of course, if the expatriating act is not admitted, it must be proved by clear and convincing evidence under *Gonzales*, *supra*. But the claim of duress

in such cases is a matter of avoidance of the effect of the expatriating act, once it had been properly proved. Gonzales did not deal with that separate issue. As we have pointed out, *supra*, pp. 34 ff, a showing of duress is not a condition precedent to expatriation, as is proof of intent to avoid military service under Section 401 (j), but rather is in the nature of a proviso which puts the burden of proof of involuntariness on the claimant.[18]

D. Whatever the burden of proof as to duress, the voluntariness of petitioner's expatriation has been sufficiently established

1. If petitioner has the ultimate burden of proving duress, he has so clearly failed to do so that further discussion is unnecessary. The trial court and the Court of Appeals have held against him on his own evidence. See the Statement, *supra*, pp. 6–8, and discussion *supra*, pp. 31–32, and *infra*, pp. 45–48.

2. Even assuming that the ultimate burden of proof rests on the Government to show voluntariness, we believe that that burden has been sustained in this case.

(*a*) The trial judge's formal findings (R. 11–12) and his remarks at the close of the trial (R. 55–59)

[18] There is, of course, at least one affirmative defense as to which the burden of proof is on the other party—the issue of insanity in federal criminal trials. Under *Davis* v. *United States*, 160 U. S. 469, the Government—though it does *not* have the initial burden of coming forward with evidence on that issue (*supra*, p. 23)—does have the ultimate burden of proving sanity beyond a reasonable doubt, once that question has been properly raised by the defendant (*supra*, p. 23). This federal rule in criminal cases rests, as the Court explicitly pointed out in *Davis*, on grounds of humanity peculiar to criminal matters. In the light of the background we have discussed (*supra*, pp. 25–34), it would be inappropriate to carry the rule over to civil proceedings involving expatriation. See also, *infra*, pp. 48–49.

supra, pp. 6–8, fn. 1 show that, on the basis of the petitioner's own testimony, the court affirmatively found that petitioner acted voluntarily—regardless of where the burden of proof might be.[*] The judge disbelieved petitioner's protestations of fear and believed that petitioner was willing, as a Japanese national, to be conscripted in order to do his duty as a loyal Japanese subject. See R. 56–57; *supra*, p. 8, fn. 1. And although the Court of Appeals did hold that the burden was on petitioner (R. 73), it also took care, independently of that legal ruling, to affirm the trial court's findings as adequately based on the evidence (R. 73–74). It pointed out that on this record the trial court was entitled "to find that the facts were otherwise than stated by the plaintiff [petitioner]" and "was not required to believe that appellant [petitioner] was himself the victim of terror conditions in Japan" (R. 74). It concluded that the "record here amply supports the conclusion of the lower court that the act of the plaintiff [petitioner] in entering the Japanese army was a voluntary act" (R. 74).

(*b*) These two-court findings-of-fact are soundly grounded in the evidence, as we have already pointed out. *Supra*, pp. 25, 31–32. Petitioner, an engineering graduate of the University of California (R. 46), went to Japan when he was of draft age, in the sum-

[*] It should be noted that District Judge Byrne, the trial judge here, has heard a very large number of cases, in the District Court for the Southern District of California, involving claimed expatriations on the ground of serving in the Japanese armed forces, voting in Japan, etc. He is particularly experienced in this field.

mer of 1939, knowing that he was a national of Japan whose name was in the family register there (R. 34), and knowing that Japan was then fighting in Manchuria (R. 25). Less than a year later, in the summer of 1940, he took a physical examination (R. 18) pursuant to the Japanese military conscription law (R. 22–23). Approximately nine months after that, in March 1941, petitioner was inducted into the Japanese army (R. 18). At no time during this interval did he seek to return to the United States, renounce Japanese nationality, or make any effort to avoid the Japanese draft by contacting American consular officials (R. 26–27). Nor did he protest his induction notice or seek relief from Japanese officials (R. 30). He testified that he did not protest his induction because he was afraid of the Kempi Tai (political police) (R. 37) and because he was told by friends that the American consulate could do nothing for him (R. 27). Yet the fact remains that he made absolutely no effort at all really to find out what his chances were. It seems hardly credible that fear was then the motivating factor when he was still a civilian and might possibly have extricated himself from his alleged predicament—particularly when one considers the fact that he was so rash as to tell his army comrades later, after this country had entered the war and when he was subject to the close scrutiny of army discipline, that America would win the war. *Supra*, p. 6. When he made that alleged statement he intimates that he was asking for martyrdom as an American patriot, for he was "beaten for about almost every day for a month; and a couple days a

month after * * *" (R. 38). But this does not jibe at all with his account of prior timorousness. Moreover, despite the fact that petitioner corresponded with his friends in the United States once a week (R. 28) and with his mother every two weeks (R. 30), besides meeting with Japanese friends who were American citizens (R. 28), he claimed he did not know that the United States was drafting men during the interval between his physical examination and his induction into the Japanese army (R. 28, 30). Although he was well educated, petitioner denied reading newspapers while in Japan (R. 26) and said he did not know there was a "cold" war between Japan and the United States (R. 46). Even if it were expedient for him to serve, "the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, * * *" is not duress. *Perri* v. *Marshall*, 170 F. 2d 721, 724 (C. A. 3); *Savorgnan* v. *United States*, 338 U. S. 491, 502.

In short, petitioner's course of conduct is diametrically opposed to his contention that his service was involuntary, and is consistent only with the findings of voluntariness made below.

(c) If the burden of proof of voluntariness is upon the Government, it is not clear whether the standard should be that of "clear and convincing evidence" (as held by *Brini* v. *Dulles*, 235 F. 2d 855 (C. A. D. C.)), or merely the normal standard of "preponderance of the evidence." We suggest that the former may be too high a criterion for proof of a fact which is so intangible, so intimately linked with an individual's private will and particular

mentality, as "voluntariness". The claimant proves his initial citizenship merely by a preponderance of the evidence (*Ly Shew* v. *Dulles*, 219 F. 2d 413, 416 (C. A. 9); *Lue Chow Kon* v. *Brownell*, 220 F. 2d 187 (C. A. 2)); the Government must then prove the actual commission of a specific act of expatriation by "clear and convincing" evidence (*Gonzales* v. *Landon*, 350 U. S. 920). To show that the act was performed voluntarily, it should be sufficient for the Government (if it has the burden) merely to adduce a preponderence of the evidence—especially in view of the claimant's exceptional opportunity to give testimony as to his private, inner, feelings, which cannot be directly controverted.

But if the proper standard is "clear and convincing" evidence, it was met here. The trial judge made it plain that he was convinced of petitioner's freedom from coercion (R. 55–58). In affirming the trial findings, the Ninth Circuit adverted to the "clear and convincing proof" against petitioner's contention (R. 74). See also, *supra*, p. 46.

3. Petitioner attempts to bolster the record by certain materials, bearing on conditions in Japan, of which he now asks the Court to take judicial notice (Pet. Br. 6–7, 22–24, Pet. Appx. 1–3). None of this material was introduced at the trial by experienced counsel, although it was then available. It obviously has no place in this proceeding and should be disregarded. Petitioner chose at the trial to stand on his own testimony, and he cannot now enlarge the record by a cavalier reference to disputed materials, somewhat comparable to those which have

been offered and often introduced at other expatriation trials, but which were not proffered here.

In any event, "each [expatriation] case must stand upon its own facts" (*Soccodato* v. *Dulles*, 226 F. 2d 243, 244 (C. A. D. C.)), and petitioner's case is quite different from the many others in which duress has been found on the basis of a combination of general evidence of Japanese conditions together with the claimant's own testimony as to his feelings, activities, and experiences.[2] The significant evidence here was petitioner's own testimony, and it was on that basis that the two courts below decided against him. *Supra*, pp. 45–46.

II. Section 401 (c) of the Nationality Act of 1940 is constitutional

Petitioner contends that the designation by Congress of service in a foreign army by an American-born dual-national as causing loss of nationality is beyond the constitutional powers of Congress. This issue is discussed in the Government's brief in *Perez* v. *Brownell*, No. 572, this Term, involving loss of nationality by reason of remaining in a foreign country to evade military service and by reason of voting in the foreign country. The Court is respectfully referred to that discussion for our argument on the issue of constitutionality.

We add a few words on the extraordinary argument (Pet. Br. 36–40) that, to avoid constitutional doubts, Section 401 (c) should be construed as not applying

[2] Judge Byrne, the trial judge here, has often found service in the Japanese army to have been under coercion.

to dual nationals—even though petitioner's service in the Japanese army is found to have been voluntary. We characterize the contention as extraordinary because, by its express terms, Section 401 (c) can apply *only* in the case of a dual national. *Supra*, p. 3. Under petitioner's suggested construction, that section would have absolutely no application or function whatever.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. Lee Rankin,
Solicitor General.
Warren Olney III,
Assistant Attorney General.
Oscar H. Davis,
Assistant to the Solicitor General.
Beatrice Rosenberg,
Albert M. Christopher,
Attorneys.

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No. 44, 19, and 70

In the Supreme Court of the United States

OCTOBER TERM, 1957.

CLEMENTE MARTINEZ PEREZ, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
J. F. BISHOP,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 44

CLEMENTE MARTINEZ PEREZ, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT

This supplemental brief on reargument will be devoted to (*a*) clarification of certain arguments made

in our initial briefs and at the original oral hearings, (*b*) presentation of some materials and arguments not included in our initial briefs; and (*c*) a response to certain of the contentions made by the petitioners last term or on the reargument.

I. FURTHER COMMENTS ON THE GENERAL POWER OF CONGRESS TO DESIGNATE WHAT CONDUCT SHALL EFFECT LOSS OF AMERICAN NATIONALITY

In our original brief in *Perez* (at pp. 13–37), we discussed at some length the general power of Congress to establish standards for loss of American nationality and to designate what voluntary conduct shall effect loss of citizenship even though the citizen does not desire or intend to lose his American nationality. In this supplemental brief, we would add the following:

A. POWERS INHERENT IN THE UNITED STATES AS A SOVEREIGN NATION

1. Our primary position is that, as this Court held in *Mackenzie* v. *Hare*, 239 U. S. 299, 311, the power of Congress over denationalization exists even though it is not spelled out in Article I, Section 8, of the Constitution. There are many examples of such powers inherent in national sovereignty, though unexpressed in the Constitution, which this country possesses, as a member of the family of nations, together with the other states of the world. See, *e. g.*, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318. The Necessary and Proper Clause recognizes the existence of such authority when it provides that Congress shall have the power not only to make all laws necessary and

proper for carrying into execution "the foregoing Powers", *i. e.*, those granted by Article I, Section 8, but also the authority to make all laws necessary and proper for carrying into execution "*all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (emphasis added).

Among the "other Powers vested by this Constitution in the Government of the United States" are those which are "inherently inseparable from the conception of nationality" (*United States* v. *Curtiss-Wright Corp., supra*), or are "necessary to maintain an effective control of international relations" (*Burnet* v. *Brooks*, 288 U. S. 378, 396). That the general power to enact loss-of-nationality legislation falls into these categories, fundamental to the authority of all sovereign nations, is shown by the simple fact that almost every nation has adopted various provisions of this kind. See Laws Concerning Nationality (U. N. Leg. Ser. 1954). And if Congress, alone among the legislative bodies of the world, has no such general power, then it could not even provide for the expatriation of Americans who voluntarily assumed the nationality of another country or took a foreign oath of allegiance, at least where the citizen desired to retain his United States nationality. But cf. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491. The petitioners in *Perez*, No. 44, and *Trop*, No. 70, explicitly recognize that that cannot be the law. See our original brief in *Perez*, pp. 13–15.

2. This general power over expatriation undoubtedly has its limits. No specific constitutional provi-

sion or prohibition governs, but the Due Process Clause of the Fifth Amendment would condemn any arbitrary or unreasonable use of the power. As stated in our initial brief in *Perez*, pp. 34-35, we suggest that it would be arbitrary and unreasonable to attach the severe consequence of denationalization to conduct which is not closely related to the cardinal elements of nationality and allegiance. But the primary responsibility is Congress's, and the choice is for it to make. The overseeing power of the courts lies within narrow confines.

In each instance, the courts must consider and weigh a multitude of factors before the legislation can be invalidated: (*a*) the general relationship of the statute to our dealings with other countries; (*b*) the possibility of international embarrassments, controversies, or conflicts of allegiance; (*c*) the citizen's showing of preference, by performing the designated act, for another country over this one, or of lack of attachment to this country; (*d*) the citizen's repudiation, by performing the designated act, of his total obligations as a citizen of this country, or of the highest demands of citizenship; (*e*) the history and general acceptance of the particular legislation; (*f*) the factual showing, and the other considerations, on which Congress acted; (*g*) the practice of other nations with comparable ideals and systems of government.

In our main briefs in *Perez* and *Trop*, we have discussed, in terms of the foregoing factors, the four denationalization provisions involved in these cases. There is additional discussion in Point III, *infra*, pp.

11 *ff.* On the basis of this discussion, we submit that none of these four provisions can be characterized as an arbitrary or capricious exercise of the powers over nationality inherent in the United States as a sovereign nation.

B. POWERS EXPRESSLY GRANTED BY THE CONSTITUTION

Even if we are wrong, and Congressional power over denationalization must be found in, implied from, or appurtenant to, a power expressly granted to Congress by the Constitution, there is adequate warrant for each of the four statutory provisions at stake in these cases. We believe that they are supported by the war power, the powers to raise and support armies and to make rules for the government of the forces, and the power of Congress to regulate our relations and intercourse with foreign nations—taken together with the Necessary and Proper Clause.

1. *Section 401 (e)—service by a dual-national in the forces of his other state.*[1] Under its express power to regulate foreign affairs, Congress has, for almost 140 years, prohibited the acceptance within the United States of a commission in a foreign army at war with a nation with which this country is at peace, or the enlistment within the United States in any foreign army. Act of April 20, 1818, secs. 1 and 2, 3 Stat. 447, 448; Rev. Stat. 5281–5282; now 18 U. S. C. 958, 959. The same constitutional power would obviously sustain a criminal prohibition against the voluntary entry, outside the United States, of an American dual-national into the forces of his other state. Similarly,

[1] Involved in the *Nishikawa* case, No. 19.

we submit that it is a "necessary and proper" incident to its power over foreign affairs for Congress to provide, not criminal punishment, but loss-of-nationality for such a dual-national—in order (*a*) to avoid conflict with the state of the other nationality over the military service of the dual-national, (*b*) to avoid conflict with third countries against whom the dual-national may have to fight, and (*c*) to avoid having a dual-national, like Nishikawa, fight against this country. See also our main *Perez* brief, pp. 38–39.

2. *Section 401 (c)—voting in a foreign political election.*[2] This provision, too, falls within the ambit of Congress's power to regulate intercourse with foreign countries. To avoid international conflicts and to preserve the integrity of American political processes and the singleness of American allegiance, Congress, could, under its granted powers, prohibit voting abroad by Americans. By the same token, it is a "necessary and proper" incident of the granted power to achieve those results by severing the cord of allegiance between the United States and the American who voluntarily votes abroad. See also our main *Perez* brief, pp. 39–40.

3. *Section 401 (j)—remaining abroad to evade military service.*[3] This subsection is sustained by the war power, the power to raise armies, and also the foreign affairs power. The relationship to the draft and to the power to wage war are manifest; the foreign affairs power is invoked by the potential conflicts incident to

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[2] Involved in the *Perez* case, No. 44.

[3] Involved in the *Perez* case, No. 44, and the *Mendoza-Martinez* case, No. 54, this Term, pending on petition for a writ of certiorari.

the draft-evader's taking refuge in a foreign country and thus seeking its asylum and protection against our Selective Service System. See also our main *Perez* brief, pp. 40–49, and Point III, *infra*, pp. 11 *ff.*

4. *Section 401 (g)—deserting the armed forces in wartime.*[4] Subsection (g) finds its constitutional warrant in the express powers to wage war, to raise armies, and to regulate the government of the armed forces. Desertion is a very grave injury to the effective waging of any war, as well as to the maintenance intact of the armed force which is being raised; and the Articles of War have always prohibited desertion, as part of the "Rules for the Government and Regulation of the land and naval Forces". The substantive power to deal with desertion in "necessary and proper" fashion clearly exists. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 155. The propriety of imposing denationalization for wartime desertion is discussed in detail in our main *Perez* brief, at pp. 49–50, our main *Trop* brief, and Point III, *infra*, pp. 11 *ff.*

II. MITIGATION AND AMELIORATION OF THE CONSEQUENCES OF EXPATRIATION

1. It is appropriate to point out explicitly, in discussing the general validity of expatriation legislation, that Congress has always been aware that some of its enactments in this area may lead to harsh results, and has therefore provided for various types of mitigation and amelioration.

For example, after World War I, Congress passed special short-form naturalization statutes "to assist men to regain their American citizenship after they

[4] Involved in the *Trop* case, No. 70.

had expatriated themselves by taking a foreign oath of allegiance required to permit them to enlist in the armies of certain foreign nations." See *Savorgnan v. United States*, 338 U. S. 491, 501 (fn. 17); 40 Stat. 340, 542.[5] Similarly, after World War II, Congress enacted such special naturalization provisions for men who had served in *non-enemy* armies during World War II, and thus may have lost their nationality under Section 401 (c) of the 1940 Act, or, under Section 401 (b), by taking a foreign oath of allegiance. See Section 327 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 248, 8 U. S. C. 1438.

For those who lost their citizenship through voting in foreign political elections, Congress, in the years after World War II, also offered the relief of short-form naturalization. See the Act of August 7, 1946, 60 Stat. 865 (applicable to voting, before that date, in elections in non-enemy states);[6] Act of August 16, 1951, 65 Stat. 191 (extending the same privilege to those voting in Italian elections in 1946 and 1948); Act of July 20, 1954, 68 Stat. 495 (the same for those voting in occupied Japan).

With respect to loss of nationality for desertion and draft-evasion, the Act of March 3, 1865, 13 Stat. 487 (discussed in our main *Perez* brief, pp. 41 *ff*, the *Trop* brief, and *infra*, pp. 11 *ff*) contained the "built-in" relief provision that it did not apply to those who re-

[5] Taking a foreign oath of allegiance was an act of expatriation under Section 2 of the Citizenship Act of 1907, 34 Stat. 1228.

[6] In No. 44, petitioner Perez, who had voted in Mexico in 1946, could have taken advantage of this ameliorating statute, but did not do so within the year prescribed by the Act.

turned within 60 days after a Presidential proclamation required by the Act to be issued. In 1912, the 1865 Act was modified to make it inapplicable to peacetime desertions (Act of August 22, 1912, 37 Stat. 356), and it was also expressly provided "That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests * * *."[7] In similar fashion, Section 401 (g) of the 1940 Act, relating to wartime desertion, was deliberately amended, during World War II, not to apply to servicemen convicted of desertion but who had served their sentences and been restored to duty. See our main *Trop* brief, p. 9, and *infra*, pp. 17, 49.

American women who, like Mrs. Mackenzie of *Mackenzie* v. *Hare*, 239 U. S. 299, lost their nationality by marrying a foreigner, between 1907 and 1922, have also been granted the comparable relief of easy, short-form naturalization (at first, after the dissolution of the marriage, and later even during the existence of the marriage). See Section 3 of the Citizenship Act of 1907, 34 Stat. 1228; Section 324 of the

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[7] This provision was described on the floor of the House by Congressman Roberts, the author of the 1912 amendment, as a "further provision in the bill so that the President, upon application, *could restore citizenship* in these cases where it had been forfeited prior to the passage of the act and thus restore these young men to their rights as American citizens" (48 Cong. Rec. 2904, emphasis added).

For the revealing legislative history of the 1912 Act, see *infra*, pp. 15–17.

Immigration and Nationality Act of 1952, 66 Stat. 246, 8 U. S. C. 1435.

2. At least with respect to the statutory provisions hinging loss of nationality on conviction of a crime (e. g., Section 401 (g) (desertion) and (h) (treason) of the 1940 Act), a Presidential pardon for the offense would also seem to restore nationality. In "blotting" out the offense and removing all "disabilities",* the pardon obliterates the necessary foundation for the loss-of-citizenship. By a proclamation of March 5, 1924, 43 Stat. 1940, President Coolidge pardoned all World War I deserters whose offense was committed after the Armistice and before the formal ending of the war, and thus restored all rights, including nationality, which had been lost under the desertion provisions of the 1865 Act. See the letter of Secretary of War Stimson, dated March 6, 1943, proposing the present version of Section 401 (g) of the 1940 Act (S. Rep. No. 382, 78th Cong., 1st Sess.): "Citizenship may be restored by Presidential pardon, granted in each individual case, or by proclamation as was done by the amnesty and pardon proclamation of President Coolidge of March 5, 1924, restoring the citizenship of those soldiers convicted of desertion after the armistice of November 11, 1918, but prior to the formal end of the war on July 2, 1921." See

* See *Ex parte Garland*, 4 Wall. 333, 380–1; *United States* v. *Klein*, 13 Wall. 128; *Carlisle* v. *United States*, 16 Wall. 147, 151; *Osborn* v. *United States*, 91 U. S. 474, 478; *Knote* v. *United States*, 95 U. S. 149, 153.

also the pardon provision of the 1912 Act, *supra*, p. 9, and footnote 7.[9]

III. ADDITIONAL COMMENTS ON THE PROVISIONS FOR LOSS OF NATIONALITY FOR REMAINING ABROAD TO EVADE THE DRAFT (SECTION 401 (J)) AND FOR DESERTION IN WARTIME (SECTION 401 (G))

A. As pointed out in our original *Perez* brief, at pp. 41, *et seq.*, both Section 401 (j) (draft-evasion) and Section 401 (g) (desertion) of the 1940 Act stem from Section 21 of the Act of March 3, 1865, 13 Stat. 490, providing for forfeiture of the rights of citizenship of deserters and enrolled draftees who departed from their districts or from the United States with intent to avoid military service—with mitigating provisions for those who returned before a certain date. These provisions of the 1940 Act therefore now have almost a hundred years of history—and general acceptance—behind them.

As shown in the *Perez* brief, pp. 42–43, the 1865 statute has been considered a provision for loss-of-

[9] In discussing the Expatriation Act of 1954, 68 Stat. 1146 (which is not involved in any of the present cases), Representatives Keating and Robsion stated that a Presidential pardon could not restore nationality, and that the expatriated individual's status could never be changed except by Act of Congress. 100 Cong. Rec. 11279, 11280, 11281. At least insofar as the denationalization follows upon conviction of a crime, we do not agree with this view; a full pardon would appear to restore the *status quo ante* the crime and thus to restore nationality. As the text shows, President Coolidge was apparently of the same view. And, in any event, Congress could clearly provide that a Presidential pardon should have the effect of restoring nationality. It did so in 1912 (see *supra*, p. 9); and in 1944 it amended Section 401 (g) of the 1940 Act to provide for restoration of nationality if the deserter was reinstated in the armed forces (see *infra*, pp. 17, 19).

citizenship and not merely one depriving the draft-evader or deserter of political rights. Additional evidence of this historical fact is furnished by Secretary of State Hamilton Fish's answer, in 1873, to queries on the subject of expatriation directed by President Grant to all his Cabinet officers. In discussing the general question, Secretary Fish wrote (*Foreign relations*, 1873, Part 2, p. 1187):[10]

> * * * and it will be remembered that Congress has asserted its right to *denationalize its own citizens*, and has defined one mode whereby the right of citizenship shall be forfeited, in the act of March 3, 1865, (13 Stat., p. 490.) which provides that, in addition to the other lawful penalties of desertion from the military or naval service of the United States, all persons who shall desert such service, or who, being enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States with intent to avoid any draft into the military or naval service, duly ordered, *shall be deemed to have voluntarily relinquished and forfeited their rights of citizenship, or to become citizens*, and shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof." [Emphasis added.][11]

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[10] This was less than a decade after the passage of the 1865 Act.

[11] Note that Congress took pains to prescribe that the draft-evaders and deserters "shall be deemed to have voluntarily relinquished and forfeited" their rights. These are terms appropriate to loss of nationality and loss of citizenship as such, rather than merely to the political rights appurtenant to citizenship: in the

Several of the 19th century cases which applied this provision of the 1865 Act, in the context of the right to vote, also characterize the statute broadly as relating to citizenship itself. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 156, 157, 158, 159, 160 ("absolute forfeiture of citizenship," "forfeiture of citizenship", "deprive this class of persons of citizenship," "plaintiff's citizenship has been forfeited"); *Severance* v. *Healey*, 50 N. H. 448, 451 ("deprive any person of citizenship", per Jeremiah Smith, J.); *McCafferty* v. *Guyer*, 59 Pa. 109, 110 ("lost his citizenship under the Act of Congress of March 3d, 1865", per Strong, J.); *Huber* v. *Reily*, 53 Pa. 112, 114, 115, 116, 118 ("forfeiture of citizenship" (several times), "deprivation of his citizenship of the United States", per Strong, J.).[12] See also the letter of Secretary of War Stimson, dated March 6, 1943, recommending the provision which is now Section 401 (d) of the 1940 Act, and referring to the prior law (the 1865 Act, as amended), as dealing with loss of "citizenship" which can be restored. See S. Rep. No. 382, 78th Cong., 1st Sess., *supra*, p. 10.

B. The legislative history of the 1865 Act does not cast much light, one way or the other, on its precise meaning, but the history of the 1912 amendment (restricting its application to peacetime desertion) is

latter case, terms of voluntary relinquishment or forfeiture are not normally used but only an outright prohibition or prescription.

[12] Mr. Justice Strong, later a member of this Court, took pains in his *Huber* opinion to point out that Congress could not legislate with respect to voting in the states.

clear that the Congress then recognized the provision as one for full loss of nationality.

1. The pertinent 1865 provision—Section 21 of the Act of March 3, 1865, 13 Stat. 487, 490, ch. 79—actually formed a part of an omnibus military measure, passed in the very closing days of the Second Session of the Thirty-Eighth Congress, which was entitled "An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out the National Forces, and for other Purposes." But the recorded history of that particular measure hardly mentions this provision.[13] It is clear that Section 21 was taken, at the end of the session, from comparable portions of other military bills which had earlier passed the Senate and the House (in differing forms) but had not been enacted into law, and the section was then incorporated, with little discussion, in the omnibus bill together with other unrelated provisions which Congress desired to make law. The true history of the provision, such as it is, is found in the debates on those earlier unsuccessful bills—S. 408 (passed by the Senate only) and H. R. 678 (passed by the House only), of the 38th Congress, 2d session.[14]

The debates on the parts of those bills concerned with the loss of the rights of citizenship for desertion

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[13] The Act of March 3, 1865, was H. Jt. Res. No. 170; see Cong. Globe, 38th Cong., 2d Sess., pp. 907, 915, 927, 1005, 1294–5, 1332, 1335, 1358, 1361, 1378, 1380, 1386, 1398, 1404, 1412, 1413.

[14] For the history of H. R. 678, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 280, 298, 338, 974–980, 1034–5, 1074, 1114, 1154–5, 1160–1, 1169.

For the history of S. 408, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 489, 572–3, 604–616, 609, 631–643.

and draft-evasion certainly stress the loss of the right to vote—disenfranchisement—and the inability to hold office as the primary consequences of the measure. See Cong. Globe, 38th Cong., 2d Sess., pp. 642–3, 1155; also p. 1378 (on the later provision in the omnibus bill). Such emphasis is quite understandable since, in 1865, that *was* the major consequence of the loss of citizenship: the country had virtually no laws barring aliens, who were as free to come and go as were citizens, and no laws providing for aliens' deportation: the great difference between citizens and aliens was in the right to vote and to hold office. Nevertheless, Senator Hendricks, in opposing the provision did characterize it in these general terms which unmistakably refer to citizenship as such: "I submit to Senators that *it is a horrible thing to deprive a man of his citizenship, of that which is his pride and honor*, from the mere fact that he has been unable to report upon the day specified after being notified that he has been drafted." (Cong. Globe, 38th Cong., 2d Sess., p. 643 (emphasis added).

2. The reports and the debate on the 1912 Act modifying the 1865 statute to apply only to peacetime desertions (Act of August 22, 1912, 37 Stat. 356) [15] are perfectly plain that Congress then viewed the 1865 statute as imposing loss of citizenship in the fullest sense, and that Congress wished to continue that provision only for wartime desertions.

The House Report (H. Rep. No. 335, 62d Cong., 2d Sess., p. 2) dwells on the great severity of the 1865

[15] H. R. 17483, 62d Cong., 2d Sess.; H. Rep. No. 335; S. Rep. No. 910; 48 Cong. Rec. 2903–5, 9542, 11131.

Act as applied to peacetime desertions, and declares that the effect of the 1865 Act

> has been, and will continue to be, so long as it remains on the statute book, *to make outlaws of thousands of American citizens* who, as boys or young men, from homesickness, dissatisfaction with military life, or without consideration of the *fearful penalty* imposed, desert from the Army or Navy.
>
> There are in the United States today *thousands of men who are literally men without a country* and their numbers will be constantly added to until the drastic civil-war measure which adds this heavy penalty to an already severe punishment imposed by military law, is repealed.[16] [Emphasis added.].

On the floor of the House, Representative Roberts, the author of the bill, emphasized the extreme harshness of the 1865 Act with respect to peacetime deserters, and repeated that "we have in this country today thousands upon thousands of young men of American birth who are literally men without a country"; he used the phrases "loss of citizenship", "now robbed of citizenship", and "loss of rights of citizenship" interchangeably. 48 Cong. Rec. 2903–4. See, also his reference to restoration of citizenship in the quotation set forth in footnote 7, *supra*, p. 9.[17] There is no doubt

[16] This House Report also quotes from reports and communications of the Secretary of the Navy clearly revealing that he interpreted the 1865 Act as depriving deserters of citizenship.

The Senate Report (S. Rep. No. 910, 62d Cong., 2d Sess.) is not as explicit as the House Report, but it reveals the same understanding of the 1865 Act.

[17] The Senate debate (48 Cong. Rec. 9542) was perfunctory, dwelling on a minor Senate amendment as to reenlistments.

that the 1912 Congress—and prior Congresses in which similar ameliorative bills had been considered—understood the 1865 statute to provide for denationalization for desertion, just as does Section 401 (g) of the 1940 Act.

C. As pointed out in our main *Trop* brief, pp. 6–9, there are several reasons why we do not think it possible to read Section 401 (g) of the 1940 Act as relating only to desertion *to the enemy*.

1. The subsection simply says "[d]eserting the military or naval forces of the United States in time of war", and it specifically refers to conviction "by court martial"; in military law the offense of desertion has never required desertion to the enemy.

2. The provision in Section 401 (g) for restoration of citizenship upon further wartime service would have little significance if the only desertion covered by the subsection were desertion to the enemy. A deserter to the enemy is very unlikely to return to our forces or, if he did, to be restored to duty; such cases of restoration would be far too rare to be of any concern to Congress (and, as shown *infra*, Congress was not in fact concerned with deserters-to-the-enemy when it enacted the restoration proviso in 1944). Moreover, a deserter to the enemy would in all probability be guilty of treason and thus covered by Section 401 (b) of the 1940 Act; subsection (g) would be superfluous and unnecessary if petitioner Trop were right in his construction.[18]

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[18] Winthrop, *Military Law and Precedents*, 2d ed., p. 645, points out that "[d]esertion to the enemy is almost invariably punished with death", another circumstance which would render Section 401 (g) superfluous if petitioner were correct.

3. Like the treason provision (subsection (h)), and unlike most of the other subsections of Section 401 of the 1940 Act, the desertion clause (subsection (g)) is expressly worded so that the act of expatriation does *not* have to occur abroad; and desertion-to-the-enemy within the United States was so improbable, in 1940 when the statute was adopted, that it cannot be thought to be Congress's only (or main) concern.

In sum, even on the bare face of Section 401—without resort to antecedent or direct legislative history—it is plain that all wartime military desertions are covered, and not merely desertions-to-the-enemy.

4. The history of Section 401 (g), both its historical background and its immediate history, provides the final and conclusive answer to Trop's contention. First, it seems clear that the progenitor of the subsection, the 1865 Act, was adopted in March 1865 not primarily to deal with desertions to the enemy, which could not have been numerous at that late stage of the Civil War (six weeks before Lee's surrender),[19] but rather to cover the many desertions to Canada, Mexico, or just back home, by the soldiers of the victorious Union army. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 155–156. Secondly, it is indisputable that, from 1865 to 1912, the 1865 Act applied to peacetime desertions and thus applied at a time when desertion to the enemy would have been impossible: "thousands" of soldiers were affected by the statute during that

[19] The Act of March 3, 1865, came a month after Sherman's march northward from Savannah, and at a time when the Confederate army had dropped to around 200,000 men, largely due to desertions. The Union army numbered just over a million at the time. See 22 Ency. Brit. (1948), p. 810.

long period. *Supra*, pp. 15–17. The Act was amended in 1912 to apply only to wartime desertions, but there was not the slightest indication that it was also to be modified to apply only to desertions-to-the-enemy; and during World War I, it was not so construed. *Supra*, pp. 9, 10, 15–17. As the direct descendant of the 1865 Act (as modified in 1912), Section 401 (g) of the 1940 Act could hardly have the much narrower purpose suggested by petitioner Trop.

Thirdly, the history of Section 401 of the 1940 Act, as it was originally enacted, does not even intimate that subsection (g), as it then stood, was limited to desertions to the enemy. And, as shown in our main *Trop* brief at p. 9, the history of the 1944 amendment which added the proviso to subsection (g) conclusively shows that the proviso was thought necessary to deal with the cases of the thousands of men who had simply deserted the forces—but not to the enemy—and had then been rehabilitated. The entire emphasis was on the men who deserted from camps or units in this country, or in overseas places of training and preparation like Great Britain; contact with the enemy was not considered of any significance. The statute was viewed in exactly the same way as the predecessor 1865 and 1912 Acts had been. See H. Rep. No. 302, 78th Cong., 1st Sess.; S. Rep. No. 382, 78th Cong., 1st Sess.; 89 Cong. Rec. 3239–3245, 7107–7108, 10134–5, 10974–10976; 90 Cong. Rec. 123, 129.

D. In his Supplemental Brief on Reargument, petitioner Trop advances the new contention that Section 401 (g) is inapplicable to his case because it has not been shown that he was dishonorably discharged from

the Army "as the result of" his conviction for desertion. He points out that his sentence was a gross one imposed on the three offenses for which he was convicted—escape; absence without leave; and desertion—and argues that for this reason it cannot be said to have been imposed "as the result of" his conviction for the offense of desertion.[20]

The short answer is furnished by the holdings of this Court, at its last Term, in *Jackson* v. *Taylor*, 353 U. S. 569, and *Fowler* v. *Wilkinson*, 353 U. S. 583, that in military law only the entry of a single gross sentence for all offenses is permitted; sentences broken down as to offenses are prohibited. In a case like this where the sentence is less than the maximum for each offense, the single gross sentence necessarily covers each and all of the convictions. 353 U. S. at 574, 578–9. In civil law, a general sentence on more than one count (a practice which is not required but merely permitted) applies as to any count which is good. *Pinkerton* v. *United States*, 328 U. S. 640, 641–2, fn. 1; *Claassen* v. *United States*, 142 U. S. 140, 146–7. There is all the more reason for accepting this rule in the military system where such gross sentences are required. On review within the military system—described in the *Jackson* and *Fowler* opinions—bad or invalid counts can be set aside and sentences reduced or mitigated.

In Trop's case, the sentence was required to include a dishonorable discharge because, in 1944, the con-

[20] It is to be noted that Section 401 (g) does not require the dishonorable discharge to be imposed *solely* as the result of a desertion conviction.

trolling Manual for Courts-Martial, 1928, required any sentence of confinement for more than six months to include a dishonorable discharge (though it might, of course, be suspended). MCM, 1928, par. 104, p. 96. On review, none of the three counts—and certainly not the desertion count, which was the most serious one—was set aside, and the full sentence, far from being mitigated, was approved "although inadequate" "in order that the accused will not entirely escape punishment" (R. 9). It must therefore be assumed that the full sentence, including the dishonorable discharge which was later executed, applies to each count, including the desertion count.[21]

If petitioner were correct in his argument, Section 401 (g) could never apply to a serviceman convicted of other offenses along with desertion and necessarily

[21] Moreover, it is wholly unrealistic to speculate, as petitioner does, that his dishonorable discharge may have been imposed because of the escapes or the absence-without-leave, and not for his desertion. Desertion is the most serious of the three crimes, and in addition the chronological sequence of petitioner's offenses shows that his desertion could not have been as technical or insignificant as he now alleges. He was convicted of some offense by general court-martial in North Africa in 1944 and confined in the NATOUSA Disciplinary Training Center (R. 8). He was then transferred to the stockade, 50th Station Hospital, and escaped from there on May 9, 1944 (R. 8). He remained absent without leave on that day (R. 9). On May 22, 1944, he escaped again (R. 8), and it was his absence after this second escape which was charged as, and found to be, desertion (R. 9). At that time his organization was in Italy, apparently in combat (R. 4).

Desertion in wartime is always a serious offense "visited with especial severity" (see Winthrop, *Military Law and Precedents*, 2d ed., p. 645), and a desertion in petitioner's circumstances—after two escapes and a prior absence-without-leave, and with the soldier's unit having gone into a combat area—would cer-

given a gross sentence (including a dishonorable discharge). In such a case the contention could always be made, as it is here, that "it cannot fairly be said" that the sentence of dishonorable discharge was the "result" of the desertion conviction rather than of the other convictions. Section 401 (g) could then apply, in petitioner's view, only to cases where the soldier was tried for desertion alone or separately. But in view of the common and praiseworthy practice of trying related offenses together in the military system, it cannot be supposed that Congress intended Section 401 (g) to apply only to the unusual instance in which desertion happened to be the only offense tried by the court-martial. Rather, Congress desired the provision for loss of nationality to apply in every case where (*a*) the soldier is convicted of wartime desertion, (*b*) he is sentenced to a dishonorable discharge on that conviction, (*c*) the conviction is upheld on review and the sentence is not mitigated but is ultimately executed, and (*d*) the conditions of the proviso of Section 401 (g) are not fulfilled. Trop meets all of these requirements.

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tainly not be regarded lightly. By Exec. Order No. 9048, Feb. 3, 1942, 7 F. R. 775, the President had lifted the maximum limits on punishment for desertion (and related offenses) so that death could thereafter be imposed; and War Dept. Circular No. 273, Sec. VI, of 1942, had called this consequence—as well as the loss of citizenship for desertion—to the attention of the army, and had directed all unit commanders to explain to their soldiers the nature of these offenses and to "emphasize the serious consequences which may result from their violation". See Compilation of War Department General Orders, Bulletins and Circulars, Jan. 1, 1943 (G. P. O.), p. 343.

IV. ADDITIONAL DISCUSSION OF CONSCRIPTION AS PROVING DURESS [22]

In our main brief in *Nishikawa*, No. 19, we urged, among other points, that (*a*) mere proof of conscription into a foreign army was not in itself sufficient to establish a *prima facie* defense of duress, (b) on the facts found by the two courts below, conscription into the Japanese army was all that Nishikawa proved, and (*c*) the courts below did not err in holding that this proof was inadequate to avoid Nishikawa's loss of nationality. In this supplemental brief, we add some further comments on the role of conscription in determining the issue of duress.

A. We emphasize again that in *Acheson* v. *Murata*, 342 U. S. 900, and *Acheson* v. *Okimura*, 342 U. S. 899, this Court has already determined that proof of conscription into the foreign army is not enough to show duress. In each of those cases, the trial court had found, and it was undisputed, that the plaintiff had been conscripted into the Japanese army. Nevertheless, the Court remanded the cases for findings as to the circumstances surrounding the appellees' military service "and the reasonable inferences to be drawn therefrom". If conscription were enough, the judgments would have been affirmed without more; there would have been no need for further findings or for a remand.[23]

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[22] This point is pertinent only to the *Nishikawa* case, No. 19.

[23] The dissenters in *Mandoli* v. *Acheson*, 344 U. S. 133, 139-140, also held that conscription, in and of itself, was not enough to show duress. The majority had no occasion to consider that issue.

B. The reported appellate cases on loss of nationality through foreign service, which are closest to *Nishikawa* on their facts, hold that the service was voluntary and not under duress. In this connection, we should also like to point out the factors additional to those present in this case which existed in the appellate cases in which the foreign military service was held to be involuntary.

1. In *Zimmer* v. *Acheson*, 191 F. 2d 209 (C. A. 10), Harry Ward Zimmer, a dual-national then living in Germany, was drafted, in 1940, into the German army; he made no report to the American consul and no effort to prevent his induction, except that he did tell the German draft board that he was an American and the board told him to "stay in line". "He testified that he was fearful harm would come to him or his wife; that they talked it over and decided that the war would not last very long and that perhaps the best thing to do would be to enter the army." 191 F. 2d at 210. The trial court held that his service was voluntary and the Tenth Circuit affirmed. 191 F. 2d at 212. As shown in our main brief, pp. 3–8, 45–48, Nishikawa's case is certainly no stronger than Zimmer's, and probably less strong since petitioner did not even inform the draft authorities that he was an American. The *Zimmer* case is directly in point.

Likewise in point is *Coumas* v. *Brownell*, 222 F. 2d 331 (C. A. 9), in which Coumas was held to have expatriated himself by taking the oath of allegiance when he was inducted into the Greek army in 1932. The court said: "It nowhere appears that he protested his induction, and he voluntarily went to Greece

[in 1932] presumably knowing that under the Greek law he, a Greek citizen, might be conscripted into the army." 222 F. 2d at 332. The close resemblance to petitioner's case is plain.

2. In determining whether duress was present or not, each particular case must, of course, stand and be judged on its own complex of facts, factors, and circumstances. But it seems worthwhile to point out that, in the appellate cases in which duress was found, there was always some significant factor bearing on duress in addition to the elements present in Nishikawa's case.

In *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1), the claimant, on receiving his Portuguese draft notice, made inquiries at the American consulate and was told to return to this country if he did not wish to serve; he told the Portuguese military authorities that he was an American citizen and did not ask to serve in the Portuguese army; he was told that the only alternative to service was a concentration camp; as soon as released from the Portuguese army, he returned to this country as a stowaway. 161 F. 2d at 861. The trial court recognized his service as involuntary, but held against him on other grounds. 161 F. 2d at 862. In *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2), Podea had applied to the American consulate for a passport, so that he could return to the United States and avoid drafted service in the Roumanian army, but he was erroneously refused the passport on the ground that he had already lost his nationality through his father's registration as a Roumanian; shortly before he was inducted, he again

applied for an American passport and was again erroneously refused; he was then conscripted and, as an incident thereof, took an oath of allegiance to Roumania; after release from service he made another unsuccessful effort to return to this country as an American and on a temporary visit here on a Roumanian passport was officially told to return and to try to enter as a permanent alien-immigrant; on his return to Roumania, he was again inducted into the army in 1941. In *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2), Pandolfo told the Italian officer in charge of induction that he was an American and should not be obligated to serve in the Italian army; he had very limited schooling and lived at a distance from the nearest American consulate. 202 F. 2d 40.[24]

In *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.), the American consulate had erroneously refused Maenza a passport to return here, and the trial court believed his testimony "that he objected vigorously when he was originally conscripted, to the point of seeking to enlist the aid of American authorities and to the extent that force had to be used to remove him to his training camp". 202 F. 2d at 455, 458–9. In *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3), Lehmann visited the American consulate before his induction, and asked whether "there would be any way of getting to the United States, because I wanted to join the Air Force at that time", but was told that he could be given no

[24] It should be noted that the Second Circuit expressly stated that, if the trial court had found Pandolfo's service to have been voluntary, "we would not have reversed such finding as clearly erroneous." 202 F. 2d at 41, fn. 6.

assistance; he was also told that the Consulate could not help him to avoid service in the Swiss Army. 206 F. 2d at 595. In *Augello* v. *Dulles*, 220 F. 2d 344 (C. A. 2), involving the taking of an oath of allegiance as a conscript in Fascist Italy in 1936 or 1937, there was grave doubt that the plaintiff had taken the oath of allegiance in 1937 when he was of age; and it was significant that after living for many years in Italy he had been conscripted when he was only 20. See also our main brief in *Nishikawa*, at pp. 29-31, for a discussion of *Augello* and the Attorney General's opinion in the *Panzica* case, 41 Op. Atty. Gen. No. 16, on which *Augello* rests.[24]

In *Alata* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.), Alata registered at the American consulate in 1928 and came again in 1929; prior to his induction into the Italian army in 1933, he was not informed by the Consulate that he should protest induction but was told that it was always possible to return to this country after his Italian military service. 221 F. 2d at 54–55. In *Soccodato* v. *Dulles*, 226 F. 2d 243

[24] *Perri* v. *Dulles*, 206 F. 2d 586, 589 (C. A. 3), concerned a man who was already serving in the Italian army (as a conscript) when Section 401 (c) became effective on January 13, 1941. The court held that his continued service was *prima facie* involuntary, "subject to rebuttal by evidence that on or after that date Italian law or military practice would have permitted the plaintiff to secure release, on the ground of his United States citizenship or otherwise". See also 230 F. 2d 259.

[25] *Monaco* v. *Dulles*, 210 F. 2d 760 (C. A. 2), does not involve duress at all, but only the proof of performance of the expatriating act itself: the court held that there was insufficient proof that Monaco had taken the Italian oath of allegiance asserted by the Government as the expatriating act.

(C. A. D. C.), the plaintiff's original taking of the oath of allegiance, in 1935, was while he was still a minor; admittedly, it did not expatriate him; he was recalled to service in 1940 (but did not take a new oath) and remained a soldier until 1946. But he became a prisoner of war early in February 1941, only a few weeks after Section 401 (c) became effective, and did not obtain release until March 1946. The court held that his "period of actual military service after the 1940 Act became effective was only a few weeks in 1941 and a few days in 1946. His failure in these two short intervals to seek release from the army did not cause a loss of citizenship." 226 F. 2d at 244–5.[27] *Stipa* v. *Dulles*, 233 F. 2d 551 (C. A. 3), involved Section 401 (d), providing for expatriation by taking employment under a foreign state; economic duress was shown in testimony that he had to take the job in order to earn a livelihood—"dire economic plight and inability to obtain employment". 233 F. 2d at 554, 556.

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[27] *De Marco* v. *Dulles*, 226 F. 2d 265 (C. A. D. C.), *Becce* v. *Dulles*, 226 F. 2d 265 (C. A. D. C.), and *Santi* v. *Dulles*, 226 F. 2d 266 (C. A. D. C.), were remanded on the authority of *Soccodato*. Similarly, *Bruni* v. *Dulles*, 235 F. 2d 855 (C. A. D. C.), made no definite finding on duress but remanded for consideration by the trial court under the criteria stated by the appellate court.

CONCLUSION

For the foregoing reasons, and those set forth in our main briefs in these cases, it is respectfully submitted that the judgments below should all be affirmed.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
J. F. BISHOP,
ALBERT M. CHRISTOPHER,
Attorneys.

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